LIBRARY
SUPREME COURT. U. S.

Office-Supreme Court, U.S.
FILED
DEC 30 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

---------- TERM

No. 975

JAMES SEAGO,

Petitioner,

versus

NORTH CAROLINA THEATRES, INC., et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

TO THE HONORABLE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES, JAMES SEAGO, PETITIONER, PRAYS THAT A WRIT OF CERTIORARI ISSUE TO REVIEW FINAL JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT ENTERED IN THE ABOVE-ENTITLED CASE SEPTEMBER 25, 1967.

MILTON BORDWIN
W. BRADLEY RYAN
50 Congress Street
Boston, Massachusetts.

COMMERCIAL PRINTING COMPANY, RALEIGH, N. C.

INDEX

	PAGE
OPINION BELOW	1
JURISDICTION	1
QUESTIONS PRESENTED	2
STATUTES INVOLVED	3
STATEMENT OF THE CASE	4
The Parties And The Theatres	4
Industry Terminology	7
Competitive Bidding In Raleigh	7
Evidence Of Rejection Of Petitioner's Superior Bids	9
Petitioner's 153 Rejected Superior Bids	9
Respondents' Rebuttal Tabulations Based On A Fallacious Premise	10
Petitioner Generally Licensed Inferior First Run Pictures	11
Superiority of Petitioner's Bids Offering Longer Playing Time And Higher Percentage Terms	14
Elimination Of Competition By Split Of Product	19
REASONS FOR GRANTING THE WRIT	23
CONCLUSION	42
APPENDIX	
A Opinion Of The Court Of Appeals	43
B Opinion Of The District Court	44
C Table of Film Rentals Less Than HOUSEBOAT at Colony Theatre	70
D Table of Abbreviated Comparative Terms on Some of Petitioner's Superior Bids	71

PAGE

E Table of Losses of Petitioner on Some "D" and "E" Pictures ---------- 75

F. Table Listing Totals of Petitioner's 153 Rejected Superior Bids By Distributor and Theatre Licensed ---------- 76

G Excerpt From Consent Judgment In United States v. Paramount Relating To Divesture of Theatres in Raleigh ---------- 77

H Table of bids from Naumkeag v. New England Theatres, Inc., 345 F. 2d. 910 (1st Cir. 1965) 78

CITATIONS

CASES:

Addyston Pipe & Steel Co. v. United States, 175 U.S. 211 ---------- 32

Ball v. Paramount Pictures, Inc. (3rd Cir.) 169 F.2d 317, 320-1 ---------- 24

Beacon Theatres, Inc. v. Westover, 359 U.S. 500 ---- 23

Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 256 ---------- 24, 37, 41

Bordonaro Bros. Theatres, Inc. v. Paramount Pictures, Inc. (2d. Cir.) 176 F.2d. 594 ---- 24, 27, 30

Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962) ---------- 23, 26, 32, 35

Delaware Valley Marine Sup. Co. v. American Tobacco Co., 297 F. 2d. 199, 206-07 (3d. Cir. 1961), cert. den. 369 U.S. 839 (1962) ---------- 27

Fox West Coast Theatres Corp'n v. Paradise Theatre Building Corp'n, (C.A. 9) 264 F.2d. 602, 607-8 -- 27, 31

Interstate Circuit, Inc. v. United States, 306 U.S. 208 ---------- 28, 32, 34, 37, 40

PAGE

J. J. Theatres, Inc. v. Twentieth Century-Fox Film Corp., 212 F. 2d 840 ---------- 24, 25, 30

Johnson v. Joseph Schlitz Brewing Co., 33 F. Supp. 176 (ED Tenn. 1940), aff'd 123 F. 2d 1016 (6th Cir. 1941) 32

Klors v. Broadway-Hale Stores, 359 U.S. 207 ------ 34

Mandeville Highland Farms v. American Crystal Sugar Co., 334 U.S. 219, 235 ---------- 32

Milgram v. Loew's, Inc. (3rd Cir.) 192 F. 2d 579 -- 24

Naumkeag v. New England Theatres, Inc. (1st Cir. 1965) 345 F. 2d 910, 914 ---------- 24, 26, 31

Paramount Film Dist. Corp'n v. Village Theatre, Inc. (10th Cir.) 228 F.2d 721 ---------- 27, 31

Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 473 ---------- 23, 29, 40

Schine Theatres v. United States, 334 U.S. 110 -- 32, 37, 41

Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., 346 U.S. 537 ---------- 25

Timken Roller Bearing Co. v. United States, 341 U.S. 593 ---------- 32

United States v. Crescent Amusement Co., 323 U.S. 173 ---------- 32, 37, 41

United States v. Griffith, 334 U.S. 100, 102-3, 109 ---------- 32, 37, 41

United States v. National Lead Co., 332 U.S. 319, affirming 63 F. Supp. 513 (SDNY 1945) -------- 32

United States v. Paramount Pictures, Inc., 70 F. Supp. 73 ---------- 35

United States v. Paramount Pictures, Inc., 334 U.S. 131 ---------- 35, 37, 40, 42

PAGE

Viking Theatre Corp. v. Paramount Film Distributing Corp., 320 F. 2d 285 (3rd Cir. 1963, aff'd 378 U.S. 123) ------ 28, 31, 39, 40, 41

STATUTES:

Clayton Act, c. 323,

§ 4, 38 Stat. 731, 15 U.S.C. § 15 ---------- 2

§ 16, 38 Stat. 737, 15 U.S.C. § 26 ---------- 2

Expediting Act, as amended, c. 646, § 17, 62 Stat. 989, 15 U.S.C. § 29 ---------- 40

Sherman Act, c. 647,

§ 1, 26 Stat. 209, 15 U.S.C. § 1 ---------- 3

§ 2, 26 Stat. 209, 15 U.S.C. § 2 ---------- 3

MISCELLANEOUS:

1955 U.S. Att'y Gen. Report on Antitrust ---------- 33

Conant, Antitrust in the Motion Picture Industry (1960) ---------- 38

Horizontal And Vertical Restraints Of Trade: The Legality Of Motion Picture Splits Under The Antitrust Laws. 75 Yale L.J., 239. Gordon ------ 34, 41

IN THE

Supreme Court of the United States

---------- TERM

No. ----------

JAMES SEAGO,

Petitioner,

versus

NORTH CAROLINA THEATRES INC., et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioner, James Seago, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, affirming a judgment entered for the respondents by the District Court, entered after the District Court allowed Motions of the respondents for Summary Judgment.

OPINION BELOW

The opinion of the District Court is reported in . It is also printed in Appendix B to this petition.

The per curiam opinion of the Court of Appeals has not yet been reported. A copy is appended to this petition, as Appendix A.

JURISDICTION

The Judgment of the United States Court of Appeals for the Fourth Circuit was entered on September 25, 1967.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1). The jurisdiction of the Trial Court was based on the Clayton Act, sections 4, 16, 38 Stat. 731 737, 15 U.S.C. section 15, 26.

QUESTIONS PRESENTED

1. Whether the court below, in the first comprehensive case dealing with documented evidence of discriminatory bidding, and where competitive bidding is a modus viviendi in the motion picture industry, may set a precedent, which if followed by other courts, will completely deprive any independent exhibitor injured by a conspiracy to discriminate through competitive bidding, of any recourse in the courts and consequently effectively place conspiring motion picture distributors and exhibitors beyond the reach of private antitrust enforcement.

2. Whether the court below, in direct conflict with decisions of this Court and the Second, Ninth and Tenth Circuits, may nullify those decisions by holding as a matter of law that a conspiracy to discriminate through competitive bidding may not be proved by a comparison of the respective bids, which would show discrimination against petitioner and conduct of respondents against their best business interests, and thus hold that a conspiracy must be proved by direct evidence and not by circumstantial evidence.

3. Whether a court may take from the jury consideration of a classic *per se* violation of the Sherman Act — a division of the market.

4. Whether the Sherman Act is violated by a "split" agreement among two of the four first run film exhibitors in Raleigh controlling 69% of the first-run seating capacity, whereby the two exhibitors divide among themselves the total product of the distributors and each undertakes not to compete with the other, but to compete only with the two

non-participating exhibitors who control a total of only 31% of the available seating capacity.

5. Whether the limits of the summary judgment procedure have been so seriously ignored by the court below, in a decision which will be a precedent for other courts, that this Court in the exercise of its supervisory power should forbid such encroachments on the right of trial by jury.

6. Whether the court below, by its holdings on the issues inherent in Questions 1-5, has not so severely limited the private antitrust suit as to cripple it as a device for enforcement of the antitrust laws, thereby expanding the litigative task of the Department of Justice and, consequently, increasing the burden of this Court in this field?

STATUTES INVOLVED

Section 1 of the Sherman Act, c. 647, 26 Stat. 209, 15 U.S.C. § 1, provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . .

Section 2 of the Sherman Act, c. 647, 26 Stat. 209, 15 U.S.C. § 2, provides:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

STATEMENT OF THE CASE

The petitioner, James Seago, operated a single first run theatre in Raleigh, North Carolina, from 1953 through 1960. On December 29, 1961, the petitioner filed suit in the United States District Court for the Eastern District of North Carolina under Sections 4 and 16 of the Clayton Act, 15 U.S.C. Sections 15, 26, alleging that the seven respondent distributors and the co-conspirator Columbia conspired with the respondent exhibitors and co-conspirator Consolidated to drive the petitioner out of business in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C., Sections 1-2. (A. 1-29). FOOTNOTE In support of their respective motions for summary judgment, each of the respondents filed affidavits of employees or former employees. It is apparent, on their face that the affidavits are generally conclusionary in nature, and amount to little more than general denials of conspiracy or discrimination against petitioner (A. 32-37, 52-59). The petitioner took depositions of resident branch managers of the respondent distributors' Charlotte Branch Office to the extent such individuals were available, and of buyers for the defendant exhibitors and Consolidated (A. 224-565). After the completion of discovery by petitioner, and the filing of depositions and affidavits, the District Judge allowed motions of the respondents for summary judgment in their favor (Appendix B). On appeal the Fourth Circuit Court of Appeals affirmed per curiam (Appendix A). The petitioner seeks a writ of certiorari in this Court.

THE PARTIES AND THE THEATRES

The petitioner, James Seago, operated the Colony Theatre in Raleigh, North Carolina, from 1953 through 1960, inclusive. When he went out of business in 1960, five of the respondent distributors were refusing to allow him to compete for first run pictures.

FOOTNOTE. In this petition the record is cited as "A" and the respective page reference.

The respondent, North Carolina Theatres, Inc. (hereinafter referred to as "North Carolina Theatres") operated three theatres in Raleigh, including the first run Ambassador Theatre, and approximately 25 or 30 other theatres throughout the State of North Carolina (A. 498-499).

The respondent, Wilby-Kincey Service Corporation (hereinafter referred to as "Wilby-Kincey") managed all the theatres of respondent North Carolina Theatres, and also a large number of other theatres in North Carolina and South Carolina. Wilby-Kincey, North Carolina Theatres, and all the other corporations operating theatres managed by Wilby-Kincey, were all wholly-owned subsidiaries of American Broadcasting-Paramount Theatres, Inc. (hereinafter referred to as "ABC-PT") (A. 498-501), the largest theatre chain in the United States.

The respondent Key Theatres, Inc. (hereinafter referred to as "Key Theatres") was the operator of the first run State Theatre in downtown Raleigh, and also the Paramount Theatre in High Point, North Carolina. Consolidated Theatres, Inc. (hereinafter referred to as "Consolidated") operated the first run Village Theatre in Raleigh from 1951 through 1960, and also operated and managed a large number of other theatres in North Carolina and South Carolina. The other respondents, all of whom are distributors of motion picture films, will hereinafter be referred to by the names they are generally known by in the motion picture industry: "MGM", "Paramount", "Fox", "Warner", "Universal", "United Artists", and "Allied Artists." FOOTNOTE [2]

Although the defendant exhibitor Consolidated and the defendant distributor Columbia Pictures Corporation (herein-

FOOTNOTE [2] The full corporate titles of each of the respondent distributors are, respectively: Metro-Goldwyn-Mayer, Inc.; Paramount Film Distributing Corporation; Twentieth Century-Fox Film Corporation; Warner Bros. Pictures Distributing Corporation; Universal Film Exchanges, Inc.; United Artists Corporation; and Allied Artists Southern Distributing Corporation.

after referred to as "Columbia"), settled with petitioner and were both dismissed from the complaint by petitioner, they are alleged to be co-conspirators.

At the time petitioner entered the motion picture business in Raleigh, first run exhibition in Raleigh was controlled by theatres of the defendant exhibitors and the co-conspirator Consolidated. The Ambassador Theatre of Wilby-Kincey and North Carolina Theatres, the State Theatre of Key Theatres, and the Village Theatre of Consolidated, all regularly exhibited pictures on a first run basis in Raleigh. FOOTNOTE [3]

During the period of petitioner's operation (1953-1960) the first run theatres[4] in Raleigh and their seating capacities were as follows:

Theatre	Operator	Seating Capacity	% of Total
Colony	Petitioner	600	15%
Ambassador	Wilby-Kincey and North Carolina Theatres	1500	37%
State	Key Theatres	1275	32%
Village	Consolidated	650	16%
	Total	2725	

The Ambassador and State Theatres were located in the downtown section of Raleigh, the Village Theatre out of the downtown area in the Cameron Village Shopping Center, and petitioner's Colony Theatre was also out of the downtown area on one of the main inter-city thoroughfares (A. 30, 248, 278-281, 489-490).

FOOTNOTE [3] Wilby-Kincey and North Carolina Theatres also operated the Varsity Theatre and a Drive-In Theatre in Raleigh, and Consolidated operated the Wake Theatre and a Drive-In. However, those exhibitors did not generally attempt to compete for first run at those theatres, obviously because they would be competing against themselves.

[4] *Runs* are successive exhibitions of a feature in a given area, first-run being the first exhibition in that area, second-run being the next subsequent, and so on. A *clearance* is the period of time, usually specified in license contracts, which must elapse between runs of the same feature within a particular area or in specified theatres. 334 US 131, 144.

Industry Terminology

Each respondent distributor and Columbia had a branch office in Charlotte, which served all theatres in the so-called *Charlotte Exchange Area,* which consisted chiefly of the States of North Carolina and South Carolina. The highest supervisory personnel of each distributor located in the branch office in Charlotte was the "branch manager." A picture is licensed, not sold, to an exhibitor who projects the print on a screen of his theatre for a specified number of days, however, the terms *"buying"* and *"selling"* are used in the motion picture industry to refer to the licensing of a picture. *Booking* is the arrangement of the actual play dates on which the picture will be exhibited at a particular theatre. Pictures were generally licensed to a theatre for a specified number of days (known as the *"playing time"*) and the rental terms on first-run pictures in a city such as Raleigh would generally be based on payment by the exhibitor to the distributor of a percentage of the gross admission receipts (referred to as the "gross"). On pictures offered through competitive bidding a fixed sum of money (known as the *"guarantee"*) would sometimes be offered in addition to the percentage terms. *Box office value* (or *earning ability*) of a motion picture is the ability of the picture to attract patrons to the theatre.

Competitive Bidding in Raleigh

Competitive bidding for first run pictures in Raleigh was in effect during part or all of the period from 1953 to 1960 with each of the respondent distributors and Columbia. The only theatres regularly bidding for or exhibiting first-run pictures were the Colony, Ambassador, State and Village. (A. 503-507). The mechanics of competitive bidding were substantially the same with each respondent distributor. A request for offer would be sent out to each of the competing exhibitors shortly before the picture was to be released in the "Charlotte Exchange Area." The bids received on a picture would be opened at the branch office in Charlotte on the due date and

forwarded to the New York office of the distributor for a final decision as to which bid would be accepted, if any. In some instances the branch manager would make a recommendation. If all bids were rejected the picture would be re-offered by either written bids, or on some occasions by oral negotiations until a final award of the picture was made. (A. 286, 342-343, 407, 416-418).

Factors which branch managers of respondent distributors testified should be considered in the award of each picture were the number of days playing time offered by each competing theatre, the percentage of the gross admission receipts offered as film rental, and whether or not a guarantee was made. (A. 298, 302-304, 353-354). If bidding was handled fairly, the picture theoretically should be awarded to the theatre that made the best bid. It is undisputed from the evidence that the best bid would be the bid that offered the distributor the *highest potential film rental from the entire first-run exhibition of the particular picture* (A. 171, 353-354).

The respondent distributors Paramount, MGM, and the co-conspirator Columbia allowed petitioner the right to bid from 1953 through 1960, inclusive (A. 266-267, 300-301, 505-506). The respondent distributors United Artists and Fox allowed petitioner's Colony Theatre bidding from 1953 to 1960, eliminating petitioner from the bidding in August and October of 1960, respectively (A. 183, 488, 504). During the entire period from 1953 through 1960, inclusive, petitioner was allowed to bid on a total of only 3 pictures of Allied Artists (all three in late 1960), although requests for competitive bidding by petitioner were made in writing in 1954, 1955, and 1957 (A. 549-553). Warner allowed petitioner bidding for first run from 1954 until April, 1958, when they eliminated petitioner from bidding for the claimed reason that he had not bid on the last five pictures (A. 415). Letters by petitioner in September, 1958 and February, 1959 requesting the right to bid, were not even answered. How-

ever, when Warner received a copy of petitioner's letter of March, 1959 to the Department of Justice, competitive bidding was immediately reinstituted (A. 411-416). About 7 months later, in October, 1959 it was again discontinued and was not resumed (A. 411-412). Petitioner was not licensed any Warner picture after October, 1959 (A. 421). Petitioner was permitted to bid on Universal pictures first run in Raleigh from 1953 through May, 1959, when the bidding was discontinued for the alleged ground that petitioner owed Universal film rental on a previous picture, and the bidding was not resumed after that (A. 373-376). Thus, at the time petitioner's Colony Theatre went out of business in 1960, five of the above-stated respondent distributors refused to permit petitioner to compete for first-run pictures in Raleigh. The gross admission receipts of petitioner's Colony Theatre in 1960 had dropped to 33% of the 1958 total, as follows: 1958 $80,271; 1959 $51,719; 1960 $26,493 (A. 71). During the respective periods stated above when petitioner was permitted to bid, there was evidence that the respondent distributors and Columbia rejected superior bids of petitioner on a total of 153 pictures.

EVIDENCE OF REJECTION OF PETITIONER'S SUPERIOR BIDS

Petitioner's 1953 Rejected Superior Bids

Petitioner's Second Affidavit lists 153 pictures during the period 1953 to 1960 which were licensed first run in Raleigh to theatres of the respondent exhibitors or Consolidated, although petitioner offered superior rental terms and states that in his opinion his Colony Theatre made the best bid. (A. 77-154). Petitioner's Second Affidavit is documented by attached summaries of the bids and box-office gross receipts and film rentals on each of the 153 pictures. The accuracy of these summaries, chiefly based on documents produced by the respondents, is undisputed. On its face the documentary evidence in the Second Affidavit demonstrates that as to

each of the 153 rejected superior bids, petitioner's Colony Theatre had offered a longer period of exhibition (playing time) or higher percentage rental terms, or both, than the terms offered by the theatre of the respondent exhibitors or co-conspirator Consolidated which was actually awarded the picture. The following shows a break-down of the 153 bids by distributor and time period:

TABLE OF REJECTED SUPERIOR BIDS OF PETITIONER SHOWING TOTAL BY DISTRIBUTOR FOR PERIOD 1953-1957 and 1958-60 (A. 83-132)

DISTRIBUTOR	1953-57	1958-60	TOTAL
Fox	13	12	25
Warner	8	1	9
Paramount	7	19	26
United Artists	17	17	34
Universal	13	9	22
MGM	2	15	17
Allied Artists	0	3	3
Columbia	8	9	17
	68	85	153

Even standing alone, the undisputed documentary evidence summarized in petitioner's 2nd affidavit (A. 77-154), and demonstrating superior rental terms by virtue of longer playing time or higher percentage rental terms, or both, is clearly evidence of discrimination and of conduct against best business interest by respondent distributors.

Respondents' Rebuttal Tabulations Based On A Fallacious Premise.

Attempting to rebut petitioner's 2nd affidavit containing evidence of 1953 rejected superior bids, respondents filed tabulations of gross admission receipts and film rentals paid on pictures of MGM, Paramount and Fox first run in Raleigh. (A. 569-571). These tabulations showed average daily grosses (gross admission receipts), and average daily film rentals at the Ambassador, State and Village Theatres,

which were three or four times as great as petitioner's Colony. Respondents urged that this inferiority of exhibition results at Colony demonstrated that longer playing time and higher percentage terms would not produce a superior bid. This argument was based on a fallacious premise, because petitioner was generally licensed inferior first run pictures. Obviously a fair comparison of exhibition results at different theatres must be based on a comparison of equal or comparable pictures. Even representatives of respondents admitted this in depositions (A. 267-268, 271-273).

Petitioner Generally Licensed Inferior First Run Pictures

The erroneous premise of respondents' tabulations was demonstrated by petitioner's 3rd Affidavit. The value of a picture in the motion picture industry is rated by its earning power, or so-called "box-office value." In his 3rd Affidavit petitioner demonstrated the general inferiority of first run pictures licensed to his Colony Theatre, by rating the MGM, Paramount and Fox pictures on respondents' tabulations according to their "box-office value" for first-run exhibition in a city such as Raleigh (A. 163-171). He rated the pictures by "A", "B", "C", "D", and "E", in diminishing box-office value, the "A" pictures being the best, and the "E" pictures being the poorest (A. 163). The results of petitioner's ratings of the MGM, Paramount and Fox pictures on respondents' tabulations were as follows: (A. 169):

THEATRE	A	B	C	D	E	TOTAL
Colony	6	4	12	13	41	75
Ambassador	23	19	6	8	4	60
Village	16	7	4	0	3	30
State	2	0	1	2	0	5

Petitioner's ratings demonstrate that of the 75 pictures of MGM, Paramount and Fox licensed to his Colony Theatre, 70% were "D" or "E" pictures, while only 13% were "A" or "B". On the contrary, 70% of the 60 pictures licensed to the Ambassador Theatre were "A" or "B", while only

20% were "D" or "E" pictures. Of the 30 pictures on respondents' tabulations licensed to the Village Theatre, it succeeded in licensing 76% "A" or "B" pictures, while only licensing 10% in the "D" or "E" category. Respondents' Brief below points out that MGM, Paramount and Fox were Colony's chief suppliers of pictures.

Yet the total of 75 pictures licensed to Colony is misleading, when it is recognized that only 10 of the pictures were in the "A" or "B" category. Obviously, no exhibitor was interested in exhibiting "D" or "E" pictures unless he had nothing else to show on the screen of his theatre. Yet of these three respondent distributors that respondents' Brief below refers to as petitioner's chief suppliers, 70% of the pictures they licensed petitioner were in the "D" or "E" category. Appendix E demonstrates the loss that the Colony Theatre from exhibition of "D" and "E" pictures of MGM listed on respondents' tabulations, based on Colony's $550 per week overhead and the film rental paid the distributor.

The percentage of the total number of pictures of MGM, Paramount and Fox which are in each category, according to petitioner's ratings, are as follows:

THEATRE	A	B	C	D	E	TOTAL PICTURES
Colony	8%	6%	16%	17%	53%	75
Ambassador	38%	32%	10%	13%	7%	60
Village	53%	23%	14%	none	10%	30
State	40%	none	20%	40%	none	5

The pictures of those three distributors licensed to the State Theatre totals only 5, since those distributors were companies on the Ambassador's side of the split of product [See Split of Product, infra].

Apparently in response to the rating of pictures in petitioner's 3rd Affidavit, respondents filed tabulations listing the total film rental earned in the entire Charlotte Exchange Area (the States of North Carolina and South Carolina) on each of the MGM, Paramount and Fox pictures set out

in their original tabulations. (A. 575-594). In most instances these Charlotte Area rentals correspond with petitioner's ratings. However, on a number of pictures the Charlotte Area Rentals are not accurate because they are based on the total film rental in all cities and towns throughout North Carolina and South Carolina, and fail to take into consideration the fact (as branch managers of many of the respondent distributors admit), that some pictures will have greater box-office value in large towns as opposed to small ones, and vice-versa. (A. 309-326, 352). Petitioner's ratings take this factor into consideration, since they are based on box-office value of the picture in a city such as Raleigh (A. 153).

However, despite this deficiency, the Charlotte Area rentals filed by respondents show that on the average petitioner was generally licensed pictures with inferior Charlotte Area rentals to those licensed the respondent exhibitors and Consolidated. Of the pictures of MGM, Paramount and Fox licensed to petitioner's Colony, only 13% had a total Charlotte Area rental of $50,000 or more, while 40% of those licensed to the Ambassador, and 50% of those licensed to the Village Theatre were in that category. (A. 590). Of the mostly undesirable pictures with total Charlotte Area rentals under $25,000, the Colony was licensed 46, while the Ambassador had only 11, and the Village only 8. The following summary of respondents' Charlotte Area rentals (with "000's" omitted), clearly demonstrates petitioner was generally licensed pictures of inferior Charlotte Area rentals. (A. 590):

	100, or over	50-99	25-49	Under 25	Total
Colony	3	9	14	46	72
Ambassador	5	17	21	11	54
Village	3	12	6	8	29
State	0	2	2	0	4

Of the 153 pictures on which petitioner offered superior rental terms as set out in his 2nd Affidavit, 34 were United Artists, 22 were Universal, 9 were Warner, 3 were Allied

Artists, and 17 were Columbia [page 15, supra]. Nevertheless, respondents did not offer tabulations of exhibition results of pictures of those distributors in support of their motions for summary judgment. Undoubtedly this was because the comparisons on these distributors' pictures would be even less favorable to respondents, since petitioner was licensed even fewer pictures of good box office value from those distributors. The petitioner did not rate the box office value of pictures of those other distributors, for which the respondents had not filed tabulations. However, the deposition testimony demonstrated during this same period from 1958 to 1960, that petitioner exhibited only one picture each from the distributors Warner, Universal and Columbia (a total of 3 pictures), which even the Branch Managers of those distributors claimed were in the top 1/3 as to box office value. There were none in that category as to Allied Artists [A. 274, 380-383, 420-421, 546-549]. The top 1/3 would appear roughly equivalent to pictures with a Charlotte Area Rental of $50,000 or more.

Superiority of Petitioner's Bids Offering Longer Playing Time and Higher Percentage Terms

Petitioner has never argued that it would necessarily produce equal or superior film rentals to the Ambassador, State and Village Theatres on an average daily basis, even on comparable pictures. However, because of the Colony's much lower overhead of less than $700 per week (A. 186), petitioner could afford to offer more days playing time and/or higher film rental percentage and thus earn for the distributor higher film rentals on comparable pictures than the theatres of the respondent exhibitors and Consolidated.

Some of respondent distributors admitted knowing a smaller theatre could do this (A. 186, 301-302, 355-356). Although petitioner was generally licensed inferior pictures, an examination of the total film rental per picture on the comparatively few "A" pictures licensed to Colony demon-

strates Colony's ability to produce superior rentals. Petitioner's discussion is directed chiefly to total film rental per picture, and not gross admission receipts or average daily film rental, since the total film rental earned is admitted by respondent distributors to be the criterion for determining the best bid (A. 171, 316, 353, 354).

The film rental earning potential of the Colony is shown by the fact that the largest film rental paid by any first run theatre in the record was $12,342 paid by the Colony Theatre on a gross of $17,161 on an exhibition of the Paramount picture WHITE CHRISTMAS for 4 weeks in 1954 (A. 158-159). (The picture was played 4 weeks, and the rental was 70% of the gross.) Also in 1954, the Colony played GLEN MILLER STORY and MAGNIFICENT OBSESSION, both of Universal, and grossed about $12,000 and paid a film rental of $6000 on each picture (A. 382-383). Nevertheless, of the 22 Universal pictures from 1954 to 1959 on which petitioner's superior rental terms were rejected, on only 3 pictures was a rental as much as $6000 paid by the first run theatre to which it was awarded. (A. 119-125).

The very Charlotte Area rentals relied upon by respondents demonstrate Colony's ability to earn superior rentals on comparable pictures. The MGM picture GIGI was rated "A" by petitioner, and had a Charlotte Area rental of 48.0 ($48,000 with '000's omitted). The following are 13 pictures of MGM, Paramount, or Fox playing the Ambassador or Village Theatres which were better pictures than GIGI according to respondents' Charlotte Area Rentals, but paid the distributor less film rental per picture:

Picture	Theatre	Days	% of gross paid	Rental	Charlotte Area Rental
GIGI	Colony	18	58%	$3473	48.0
THE SHEEPMAN	Village	10	42%	$2174	53.0
IMITATION GENERAL	Village	10	40%	$2202	55.5
ADVENTURES OF HUCK FINN	Village	12	40%	$2616	74.6
THE HUNTERS	Ambassador	7	40%	$1796	57.4
INN SIXTH HAPPINESS	Ambassador	13	47%	$2504	74.9
WARLOCK	Ambassador	7	40%	$1937	48.7
BEST OF EVERYTHING	Ambassador	11	48%	$3470	62.4
ROCK-A-BYE	Ambassador	10	43%	$3010	78.0
SAMSON & DELIAH	Ambassador	10	50%	$2260	67.6
BELL BOY	Ambassador	7	21%	$2025	71.4
TEACHER'S PET	Village	11	40%	$2820	55.2
DON'T GIVE UP THE SHIP	Village	11	50%	$3250	78.6

It is important to note with regard to each of the above pictures that the Colony Theatre paid the higher film rental on GIGI by offering longer days playing time and a higher percentage of the gross receipts.

Testimony of some of the managers of respondent distributors also demonstrates they knew that the Colony Theatre could pay more rental by offering longer playing time and higher percentage terms. For example, the Paramount manager admitted BUCCANEER was awarded to Colony when petitioner offered twice the playing time of the Ambassador of North Carolina Theatres (21 to 10 days), even when Ambassador's guarantee was slightly larger (A. 352-353). The exhibition results show BUCCANEER paid Paramount a film rental greater than that paid by many pictures which were superior, based on the Charlotte Area film rentals of respondents, which played the Ambassador, State or Village.

FOOTNOTE [5] Nevertheless, petitioner's 2nd Affidavit demonstrates many other pictures on which petitioner's bid offered longer playing time and higher percentage terms than the Ambassador, and yet the picture was awarded to the Ambassador rather than the Colony. On the Fox picture HIGH TIME, the Colony offered three times as much playing time (21 days to 7 days) and a much higher film rental percentage, and yet the picture was awarded to the Ambassador. (A. 177-178). The ability of the Colony to pay more film rental on comparable pictures is also demonstrated by the fact it paid more film rental on PAJAMA GAME than the Ambassador paid on BAD SEED, although the Warner branch manager admitted the pictures were of comparable box-office value (A. 432-433). BAD SEED had been awarded to Ambassador despite petitioner's offer of double the playing time (14 days to 7 days) and higher film rental percentage (A. 179).

Similarly on HOUSE BOAT the Paramount manager admitted that Colony's rental was one of the best in the Charlotte Exchange Area (A. 350-351). HOUSE BOAT was rated "A" by petitioner, and the ability of the Colony Theatre to earn superior film rentals on "A" pictures is demonstrated by Appendix C, which lists 12 better pictures according to respondents' Charlotte Area Rentals, which earned less rental at the Ambassador or Village than Colony's $4031 on HOUSE BOAT.

FOOTNOTE [5] The picture BUCCANEER of Paramount had a Charlotte area film rental of 87.4 but the Colony by offering longer playing time paid more film rental than was paid by the Ambassador Theatre on a number of pictures of Paramount with a higher Charlotte area rental:

Picture	Theatre	Days	Rental	Charlotte Area Rental
BUCCANEER	Colony	28	$4558	87.4
LI'L ABNER	Ambassador	9	$3610	98.9
PHYSCHO	Ambassador	14	$4053	117.1
G. I. BLUES	Ambassador	10	$4221	179.4

Likewise, MGM's award of DON'T GO NEAR THE WATER to the Colony demonstrates MGM's knowledge of the superiority of a Colony bid containing 50% more playing time than the Village Theatre's bid (21 days to 14 days), even where the Village Theatre offered a guarantee of $4025 and the Colony offered no guarantee. The results further demonstrated the superiority of the longer playing Colony's bid. The film rental of $5333 paid by Colony was in substantially in excess of Village's $4025 guarantee, and was more film rental than the Ambassador paid on a number of better pictures according to the Charlotte area film rentals[6] of respondents (A. 302-304).

Despite this film rental petitioner's 2nd Affidavit lists numerous pictures where plaintiff offered at least 50%, more playing time and higher percentage terms but his bid rejected and the picture was awarded to the Village (A. 77-154, 301-304).[5] Yet where petitioner offered twice the playing time of the Village Theatre on the MGM picture LAST VOYAGE it was rejected, and the MGM manager was unable to remember the *good reasons* he thought he must

[5] On the Fox picture MAN IN GRAY FLANNEL SUIT, the Colony's bid was superior to the Village's by longer playing time and higher film rental percentage by the almost identical margin of superiority as in DON'T GO NEAR THE WATER, and yet Fox awarded the picture to the Village, rather than the Colony (A. 177). Numerous similar examples are set out in petitioner's 2nd and 3rd affidavits (A. 77-154, 177-187).

[6]

Picture (A DX (b))	Theatre	Days	Film Rental	Charlotte Area Rental
DON'T GO NEAR THE WATER	Colony	25	$5333	99.7
PSYCHO	Ambassador	14	4053	117.1
G. I. BLUES	Ambassador	10	4221	179.4
WORLD OF SUZIE WONG	Ambassador	14	5084	124.7
JOURNEY CENTER EARTH	Ambassador	12	3772	101.2
FROM THE TERRACE	Ambassador	14	5110	123.4

have had why he had thought 14 days at the Colony was better than 7 days at the Village on BROTHERS KARAMAZOV, but had thought the reverse, that 7 days at the Village was better than 14 days at the Colony on LAST VOYAGE (A. 326-328),[6] which MGM awarded to the Village.

The State Theatre played very few pictures of the distributors listed on defendants' tabulations (MGM, Paramount and Fox) because they were on the Ambassador's side of the split of product with the State, infra; but it should be noted that petitioner's 2nd affidavit lists 53 pictures (mostly United Artists, Universal and Columbia) on which petitioner had the best bid, but the picture was awarded to the Key Theatres' State Theatre (See Appendix F). Space limitations make it impossible to discuss each individual superior bid set forth in the petitioner's 2nd affidavit in further detail. However, the details with regard to each bid (on most of which petitioner offered both longer playing time and higher percentage terms) are documented in his 2nd affidavit, and some of the bids are analyzed in more detail in his 3rd Affidavit (A. 77-154, 177-187). Petitioner has summarized the terms of some of his rejected superior bids documented in his 2nd affidavit (A. 77-154, inclusive), on which his rejected bid contained higher film rental and 50% to 100% more playing time than the theatre of the respondent exhibitors or Consolidated to which the picture was awarded. (See Appendix D, attached).

ELIMINATION OF COMPETITION BY SPLIT OF PRODUCT

The evidence demonstrated there was in effect between the respondent exhibitors in Raleigh an agreement to "split" product of the respondent distributors and Columbia whereby

[6] BROTHERS KARAMAZOV and LAST VOYAGE were in the same range of Charlotte area film rentals, 35.5 and 29.9, respectively, but the Colony's picture produced a larger film rental $1935 to $1386 (A. 580, 583).

the Ambassador would bid or negotiate only for first-run pictures of the distributors Paramount, Fox, Warner Bros., MGM and Allied Artists, and the State Theatre would bid or negotiate only for pictures of the distributors Universal, United Artists and Columbia, and that neither would attempt to bid or negotiate for pictures on the other theatres' side of the "split." The "split" of product, of course, completely eliminated competition of the respondent exhibitors with each other in Raleigh. Occasionally Ambassador or State Theatres would exhibit a picture from the other's side of the split, but it would generally be a reissue or a picture of lesser box-office value and was undoubtedly the result of an agreement between the exhibitors. A table included in petitioner's brief below summarizing the play-off of first-run pictures clearly demonstrated this non-competition agreement from 1957 to 1960:

DISTRIBUTORS ON AMBASSADOR THEATRE SIDE OF SPLIT (1957-60)

Distributor	Ambassador	State
Paramount	44	5
MGM	16	3
Fox	75	3
Warner	57	3
Total	193	14

DISTRIBUTORS ON STATE THEATRE SIDE OF SPLIT (1957-60)

Distributor	State	Ambassador
United Artists	105	none
Columbia	27	5
Universal	59	none
Total	191	5

Respondents did not dispute the accuracy of this table. Remarkably the film buyers for Wilby-Kincey and North Carolina Theatres (Ambassador Theatre) and Key Theatres (State Theatre), categorically denied any agreement to split. They simply had no explanation as to why the product of

the distributors divided between the Ambassador and State in that manner. Since the District Court conceded in its opinion that there was evidence from which the split of product could be inferred (A. 212), further detailed discussion of the evidence seems unnecessary. However, it is significant that with the exception of the repeated denials of the film buyers of the defendant exhibitors of any split of product, absolutely all of the evidence from their testimony and from the documents pointed unequivocally to the agreement to split. FOOTNOTE.

The courts below held that even assuming the split system " . . . had its effect to limit competition . . . it would not have damaged plaintiff . . . " (A. 213). This conclusion is clearly contradicted by the evidence. The non-competition agreement between the Ambassador and State worked "hand in glove" with the rejection of petitioner's superior bids, and further diminished his chances of getting good first run pictures. The Ambassador with 1500 seats and the State with 1275, each had at least double the seating capacity of the Village and petitioner's Colony. The non-competition agreement between the defendant exhibitors therefore render-

FOOTNOTE. The principal buyers of pictures from the respondent distributors for the Ambassador and State Theatres were the brothers Roy Smart and Hugh Smart, respectively. In their depositions both brothers consistently denied any agreement to split or divide the product. Each testified that they knew the Ambassador would generally exhibit Warner, Fox, Paramount, MGM and Allied Artists pictures and that the State Theatre would generally exhibit Universal, United Artists and Columbia (A. 445-446, 477-481, 512-515).

Although Roy Smart insisted that this play-off pattern was not the result of an agreement with his brother, or even the result of a conscious decision on his part, he was at a complete loss to explain why he had bid in each particular year only a few, or in some cases none, of the pictures on the State Theatre's (his brother's) side of the split, even when a number of those pictures were of a box-office earning value which would be desirable for exhibition at the Ambassador. Generally Hugh Smart's testimony was the same with regard to the companies on the State Theatre's side of the split. (A. 463-467, 476, 515-520). Other details of their testimony regarding split is outlined in the Appendix.

ed 69% of the total first run seating capacity non-competitive. The rejection of petitioner's 153 superior bids effectively eliminated Colony's competition on the large majority of good pictures. However, without the non-competition agreement the rejection of Colony's bids would not have served its purpose, since each defendant exhibitor would still have been faced with the competition of the largest other first run theatre in Raleigh. Although Consolidated's Village Theatre also bid, the split agreement was effective to channel pictures to the defendant exhibitors pursuant to the split. Of 50 superior bids of Colony rejected by distributors on Ambassador side of the split from 1958 to 1960 (Fox, Warner, Paramount, Allied Artists, and MGM), 70% were licensed to the Ambassador. Of 34 pictures of distributors on the State's side of the split (United Artists, Universal, and Columbia), on which Colony's superior bid was rejected, 80% were licensed to the State Theatre.

Defendant exhibitors by dividing their resources into two sub-markets in which they had agreed not to compete with each other, were able to effectually conserve their resources to compete with petitioner's Colony in each sub market, while petitioner was "spread thinner" by competing in both submarkets against both State and Ambassador. The split agreement rendered 69% of the first run seating capacity noncompetitive, and State and Ambassador were both in a stronger position to compete against petitioner in their respective sub-markets, than if defendant exhibitions had been competing against each other in both sub-markets.

The injury to petitioner's Colony from the split system became even more pronounced in the latter part of the period 1958-1960, since Universal refused to let petitioner bid for the last one year and a half, and Warner for two of the last three years. With competitive bidding eliminated, Warner and Universal both licensed by negotiation their former customers before bidding, the Ambassador and State Theatres, respectively. (A. 435-437, 362, 384-385). The elimination

of petitioner from bidding on Universal and Warner pictures insulated each defendant exhibitor from petitioner's competition, and the split agreement eliminated competition with each other. As a result State and Ambassador, with a monopoly of Universal and Warner pictures, respectively, in their submarkets, could conserve their resources by obtaining those pictures at lower rentals and without competition, and were in a stronger position to bid higher against petitioner on pictures of other distributors which were still permitting petitioner to bid. Petitioner's Colony's gross admission receipts by 1960 had been reduced to only 1/3 of the total for 1958. Colony's gross admission receipts for 1958 and 1960 were $80,271 and $26,493, respectively (A. 71).

REASONS FOR GRANTING THE WRIT

1. The decision of the courts below is in direct conflict with numerous decisions of this Court, and other courts, which have held that evidence such as presented by petitioner in the courts below clearly warrants submission of the issue of conspiracy to the jury.

In a long line of decisions this Court has emphasized that in antitrust actions, as in other actions, disputed issues of fact must be submitted to the jury. This has been more recently pointed out by this Court in *Beacon Theatres, Inc. v. Westover,* 359 U.S. 500 at 504 (1959), *Continental Ore Co. v. Union Carbide and Carbon Corp.,* 370 U.S. 690, at 696-699 (1962), and *Poller v. Columbia Broadcasting System, Inc.,* 368 U.S. 464, at 472, 473 (1962).

In the instant case petitioner has offered evidence of 153 bids with superior rental terms which were rejected, 17 by the co-conspirator Columbia, and 136 by the respondent distributors (A. 77-154). Since the particular respondent distributor would have earned more revenue on each of those 153 pictures by accepting petitioner's superior bids, the refusal was contrary to its "best business interest." It can hardly be disputed

that conduct against best business interest warrants an inference of conspiracy. See Bigelow v. RKO Radio Pictures, Inc., 1946, 327 U.S. 251, 256; *Bordonaro Bros. Theatres, Inc. v. Paramount Pictures, Inc.*, (2d Cir.) 176 F. 2d. 594, at 596, 597 (1949); *J. J. Theatres, Inc. v. Twentieth Century-Fox Film Corp.*, (2d Cir., 1954) 212 F. 2d. 840, at 844; *Milgram v. Loew's, Inc.*, (3rd Cir., 1951) 192 F. 2d. 579, at 583; *Ball v. Paramount Pictures Co., Inc.*, (3d Cir., 1948) 169 F. 2d. 317, 319, 320; *Naumkeag v. New England Theatres, Inc.*, (1st Cir., 1965), 345 F. 2d. 910, at 914.

> " . . . So evidence tending to show that an independent exhibitor, operating a theatre at least as desirable as the theatres of the exhibitors affiliated with the major concerns, was refused first-run films for exhibition was held to make out a prima facie case under the antitrust laws in *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 66 S. Ct. 594, 90 L. Ed. 652. *Cf. William Goldman Theatres v. Loew's Inc.*, 3 Cir 150 F. 2d 738.
>
> Bordanaro Bros. Theatres v. Paramount, supra, at 597.

Naturally respondents attempted to controvert petitioner's evidence of conduct of respondents against best business interest. They urged that based on their tabulations the superior rental terms offered by petitioner would not have earned superior rentals. Petitioner submits that his evidence of superior rentals paid on longer playing time on comparable pictures which he actually exhibited has shown respondents' arguments to be unsupported in the record. Of course, on summary judgment the evidence must be viewed most favorably to petitioner, but even if the disputed evidence were viewed most favorably to respondents, at most it would present an issue for determination by the jury. In *Bordonaro Bros. Theatres, Inc. v. Paramount*, supra, where plaintiff relied upon the superiority of its theatre over the favored Haven Theatre, the Court said (at 597):

> "... true, the defendants sharply controverted this view and presented evidence to show that the Haven was the more desirable theatre. But it is hard to see what function the jury is to serve in these trials if it is not to be to evaluate just this kind of evidence."

Here the situation is similar where petitioner has offered evidence of the superiority of bids made by its theatre over those of respondent exhibitors and Consolidated, and respondents have tried to offer evidence to show the other theatres were more desirable. Again in *J. J. Theatres, Inc. v. Twentieth Century-Fox,* supra, where defendants attempted to controvert plaintiff's evidence of the superiority of its theatre over the favored theatre of a defendant, the Second Circuit stated, in reversing a directed verdict by the Trial Court, that (at 844):

> "... The jury might justifiably have found ... that if actuated by legitimate business reasons alone a distributor would have selected the theatre (plaintiff's) for such licensed exhibition of feature pictures."

In *Theatre Enterprises v. Paramount,* 346 U.S. 537 this Court in holding that Petitioner was not entitled to a directed verdict in his favor, but that the controverted evidence raised an issue for determination by the jury, stated (541-542):

> "... Here each of the respondents had denied the existence of any collaboration and in addition had introduced evidence of the local conditions surrounding the Crest operation which, they contended, precluded it from being a successful first-run house. They also attacked the good faith of the guaranteed offers of the petitioner for first-run pictures and attributed uniform action to individual business judgment motivated by the desire for maximum revenue. *This evidence, together with other testimony of an explanatory nature raised fact issues*

requiring the trial judge to submit the issue of conspiracy to the jury." (Italics supplied).

Again in *Continental Ore v. Union Carbide,* supra, this Court emphasized that it is the function of the jury to weigh the controverted evidence:

> "Undoubtedly, all of the evidence during this period does not point in one direction and different inferences might reasonably be drawn from it. There was, however, sufficient evidence to go to the jury and it is the jury which 'weighs the contradictory evidence and inferences' and draw 'the ultimate conclusions as to fact.'

As already noted, the respondent distributors Warner, Universal, Fox, United Artists and Allied Artists, not only rejected petitioner's superior bids as set forth, but during various periods refused to permit petitioner to bid at all. None of those five distributors were permitting petitioner to bid when he was driven out of business in 1960. Since competitive bidding tended to increase a distributor's film rentals, the elimination of competitive bidding and the consequent lowering of film rentals is clearly evidence of conduct against the distributor's best business interest. (A. 435-437, 502-503). In *Naumkeag v. New England Theatres, Inc.*, supra, the Court stated (at 914):

> "On its face, a refusal to permit competitive bidding, or the unfair conduct of competitive bidding . . . *would appear to constitute action against individual business interest from which a jury may infer conspiracy.*" (Italics supplied).

The opinion of the District Court held that petitioner had " . . . not offered any evidence of a common plan, scheme or design among the alleged conspirators." (A. 219). The Courts below incorrectly assumed that the conduct of the respondent distributors must be absolutely identical in order

to be evidence of horizontal conspiracy. This contention is contrary to logic and to the authority. In *Fox West Coast Theatre Corp. v. Paradise Theatre Building Corp.,* (9th Cir., 1958), 264 F. 2d. 602, at 604, the Court stated:

> " . . . that it was possible for the jury to conclude from the evidence that the simultaneous refusal of Fox and Loew's amounted to the forbidden parallelism worked out by different methods . . . "

Accord: *Delaware Valley Marine Supply Co. v. American Tobacco* (3rd Cir., 1961), 297 F. 2d. 199, at 204, cert. den. 369 U.S. 839. Here the conduct of each respondent distributor was uniform in the essential respect that it denied petitioner regular access to good first-run pictures. It was accomplished by rejection of petitioner's superior bids and refusal to permit petitioner to bid.

The rulings of the courts below also completely overlook the fact that the evidence of conduct against best business interest, shown by the rejection of petitioner's superior bids and refusal to permit bidding at all, was probative of vertical conspiracy between each respondent distributor in the favored defendant exhibitor. In *Bordanaro Bros. Theatres, Inc. v. Paramount,* supra, where plaintiff was relying primarily on conduct of defendant distributors against best business interest the Court said (at 598):

> "Even a single vertical conspiracy between Paramount, as a distributor, and Warner as an exhibitor, would hardly be outside the scope of the pleadings and proof, against such a background."

See also: *Paramount Film Distributing Corp. v. Village Theatre, Inc.,* 228 F. 2d 721, (10th Cir. 1955), at 726. Here the evidence warranted an inference of either horizontal conspiracy or vertical conspiracy, or both horizontal and

vertical conspiracy within the same framework as in *Interstate Circuit v. United States,* 306 U.S. 208, at 219.

Tested by a long line of the decisions in this Court and in various circuit courts, it is clear that petitioner offered ample evidence to warrant submission of the issue of conspiracy to the jury. The ruling of the District Court in allowing the respondents' motions for summary judgment, and of the court below in affirming that holding, all in square conflict with the aforesaid decisions.

In addition petitioner's evidence of 153 rejected superior bids related to all seven respondent distributors and Columbia, but respondents filed rebuttal tabulations as to only three distributors: MGM, Paramount and Fox (A. 568-594). Nevertheless summary judgment was granted as to four respondent distributors (Allied Artists, Warner, Universal and United Artists), for which respondents filed no rebuttal tabulations.

In this case the documentary evidence of the 153 superior rejected bids of petitioner, was supported by the opinion stated by petitioner in his 2nd affidavit that on each picture specified his bid was in fact superior (A. 77-82). Petitioner had been the operator of the Colony Theatre in Raleigh from 1953 through 1960, and had had 18 years of paid employment in the motion picture business prior to that time. Considering the evidence most favorably to petitioner, certainly petitioner was well qualified to give his opinion after study of the documents (A. 77-78, 161-162). Petitioner's opinion was never weakened in any way by respondents. He was never cross-examined, or his deposition taken. Nor did respondents offer contrary testimony from any claimed counter-expert. In *Viking Theatre Corp. v. Paramount Film Distrib. Corp.,* 320 F. 2d 285 (3rd Cir. 1963), aff'd per curiam by divided court 4-4, 378 U.S. 123, relied upon so heavily by

the District Court Judge, FOOTNOTE. there was a trial of many weeks where the Trial Judge had an opportunity to view the demeanor and credibility of the witnesses, and plaintiff's proposed evidence of superior bids was subject to many days of cross-examination, and narrowed down to nine "arguably superior" bids among all distributors (supra, at 295). In the instant case the Trial Judge never saw a single witness or heard a word of testimony. Nor did either court below compare and consider the comparative terms on even one of petitioner's 153 superior bids, since they held that any comparison was "speculation."

If ever a plaintiff in an antitrust case was unjustly deprived of his day in court, this is the case. The courts below showed a complete disregard of the principles applicable to the summary judgment procedure, as long set forth by this Court, and recently restated in *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473:

> "It may be that upon all of the evidence a jury would be with the respondents. But we cannot say on this record that 'it is quite clear what the truth is.' Certainly there is no conclusive evidence supporting the respondents' theory. We look at the record on summary judgment in the light most favorable to Poller, the party opposing the motion, and conclude here that it should not have been granted. We believe that summary procedures should not have been granted. We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be

FOOTNOTE. In Viking the issue of proof of conspiracy based on rejection of petitioner's superior bids was never before this Court on certiorari. In this Court the chief question raised, and on which this Court was divided 4-4, was the per se illegality of split of product between exhibitors.

given their testimony can be appraised. *Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of 'even handed justice.'"* (Italics supplied).

The limits of summary judgment procedure have been so seriously ignored, that this Court in the exercise of its supervisory power should forbid such encroachments on the right of trial by jury.

2. The decision of the Court below is in direct conflict with the decisions of the Second Circuit and other Circuit Courts. In effect, the Court below has held that evidence of conduct of defendants against best business interest in an antitrust case must be undisputed in order to warrant an inference of conspiracy. Where defendants dispute it, the Fourth Circuit holds that petitioner's evidence of conduct against best business interest " . . . amounts only to speculation or conjecture, and he would not be allowed to go to the jury based upon such contentions." (A. 218). This decision is in direct conflict with a series of decisions in the motion picture industry in the Second Circuit. See *Bordonaro Bros. Theatres, Inc. v. Paramount Pictures, Inc.*, supra at 596, 597, and *J. J. Theatres, Inc. v. Twentieth Century-Fox Film Corp.*, supra, at 844. In both of those actions the plaintiff claimed that it had been deprived of earlier run pictures due to conspiracy by defendant distributors to favor defendant exhibitors, and offered evidence that plaintiff's theatre was superior, and therefore could pay more film rental than the theatre of the favored defendant exhibitor. In each case, the defendants presented evidence sharply controverting plaintiff's evidence of conduct against best business interest; but the Second Circuit held that the evidence would warrant a finding of conspiracy, and therefore required submission of the case to the jury. In the Seago Case the evidence of conduct against best business interest is even more compelling. Petitioner has offered documented comparisons of bids from which the jury could find the respondent distributors and co-conspirator

Columbia rejected petitioner's bids offering superior rental terms on 153 specific pictures, and awarded the picture co. a theatre of the respondent exhibitors or co-conspirator Consolidated. Contrary to the holding of the Fourth Circuit, the decisions of the Second Circuit hold that when respondents controverted this evidence it presented an issue for determination by the jury. The decision in the instant case would also conflict with decisions of the Ninth Circuit and Tenth Circuit. In *Fox West Coast Theatres Corp. v. Paradise Theatre Bldg. Corp.* (9th Cir., 1958), 264 F. 2d. 602, at 607, the Court held that the question whether the defendant distributor acted because of reasonable business considerations, or had entered into a conspiracy to refuse plaintiff pictures except through competitive bidding, was a question for the jury. See also *Paramount Film Distributing Corp. v. Village Theatre, Inc.*, supra, at 725-726. The discussion of the First Circuit in *Naumkeag v. New England Theatres, Inc.*, 345 F. 2d 910, (1st Cir., 1965), at 914 is significant, since that court held that evidence of rejection of a total of only ten bids by two distributors (Paramount and Fox), which were arguably superior was evidence of conspiracy, although upholding the District Court's directed verdict because that proof of unfair competitive bidding related to a different conspiracy for which it held plaintiff did not seek damages. (Petitioner has attached as Appendix H the tabulations relating to the ten rejected bids in *Naumkeag*, supra.)

3. By validating the split system in this case, the court below has authorized a division of the market among buyers, which is *per se* illegal under a long line of Supreme Court and lower court opinions under sections 1 and 2 of the Sherman Act. The only departure of this Court, if it can be called a departure, is *Viking Theatre Corp. v. Paramount Film Distrib. Corp.*, 320 F. 2d. 285 (3rd Cir. 1963), aff'd per curiam 378 U.S. 123, by a divided Court 4-4.

Divisions of markets between competitors have been consistently condemned as invalid under the Sherman Act, since

they have no purpose other than to stifle competition. *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211, recently re-affirmed in *United States v. National Lead Co.*, 332 U.S. 319, affirming 63 F. Supp. 513 (SDNY 1945), and *Timken Roller Bearing Co. v. United States*, 341 U.S. 593.

In *Addyston* the court disregarded defendants' argument that the agreement in question prevented ruinous competition, and found illegal an agreement between competing manufacturers of pipe to divide the market by assigning each party to the agreement an exclusive territory in which no other member could compete.

Many of the cases refer to territorial divisions, but the essence of the illegal restraint is the division of customers between the conspirators. This was apparent in *Johnson v. Joseph Schlitz Brewing Co.*, 33 F. Supp. 176 (ED Tenn. 1940), aff'd 123 F. 2d 1016 (6th Cir. 1941), where an agreement by three national beer distributors not to solicit each other's draft beer customers in a single territory was held illegal on a theory identical to the *Addyston* line of cases. Likewise, in *Continental Ore Co. v. Union Carbine Corp.*, 370 U.S. 690, 708, the Supreme Court spoke of "allocation of customers" as "per se violations under §1 of the Sherman Act."

In the instant case, where the market division is among buyers rather than sellers, the same law is applicable. The Sherman Act applies to buyers' conspiracies as well as to sellers', and *per se* rules apply equally to both. See *Mandeville Highland Farms v. American Crystal Sugar Co.*, 334 U.S. 219, 235. This result is nowhere more apparent than in the chain of landmark Supreme Court cases in this same motion picture industry. *Interstate Circuit v. United States*, 306 U.S. 208; *United States v. Crescent Amusement Co.*, 323 U.S. 173; *United States v. Griffith*, 333 U.S. 100; *Schine Chain Theatres v. United States*, 334 U.S. 110. These cases related

to conspiracy among motion picture exhibitors covering a wide range of anti-competitive and monopolistic practices, and in each of the cases, the exhibitors had "pooled their buying power for a common end" — namely, "to crush competition." *Crescent Amusement Co.*, supra, at 183.

The split system as a division of the product market among the respondent exhibitors, had for its purpose the elimination of competition for film among them. This system rendered non-competitive 69% of the available seating capacity in the Raleigh market. The respondent exhibitors disliked competition because it tended to drive up the price (A. 435-437, 502-503), and the system resulted in lower rental terms for product, particularly on pictures of the distributors Warner, Universal and Allied Artists when there was no bidding. With petitioner eliminated from competitive bidding, Warner and Universal licensed exclusively by negotiation their former customers pursuant to this split, State and Ambassador, respectively. The result guaranteed respondent exhibitors' monopoly of Warner and Universal pictures in their sub-markets without competition, and at the lower non-competitive film rentals, enabling respondent exhibitors to conserve their resources in those sub-markets and to bid higher against petitioner on those respondent distributors which still allowed petitioner bidding. The split system greatly increased the respondent exhibitors' bargaining power over their respective splits to the detriment of petitioner. Under this system respondent exhibitors concentrated their buying power in their respective split markets, and the concentration itself greatly diminished the effectiveness of petitioner who competed in both markets.

On these facts it is readily apparent that the split system comes within the definition of the classic division of markets agreement. Such agreements were condemned by the 1955 U.S. Att'y Gen. Report on Antitrust, p. 26:

"There is little doubt, either as a matter of principle

> or of precedent, that agreements among competitors for market division should be and are treated like price control arrangements."

In arriving at this same conclusion, a recent comprehensive article relating to splits in the motion picture industry criticized the Third Circuit's opinion in *Viking*, supra: FOOTNOTE.

> If the reading of the governing antitrust law presented here is correct, splits are per se unlawful. Like price fixes and market divisions, exhibitor agreements not to compete in the licensing of film product interfere with the price mechanism and thereby misallocate resources. It is too late to argue, as the price fixers and market dividers have argued since the turn of the century, that ruinous competition is a defense to such antitrust violations. And to admit that splits protect exhibitors who would be eliminated by competition is but to acknowledge their pernicious effect.

The respondent distributors, having concurred and acquiesced in the split system, are also liable for violating the Sherman Act even though the system was primarily for the benefit of respondent exhibitors. *Interstate Circuit v. United States*, 306 U.S. 208; *Klors v. Broadway-Hale Stores*, 359 U.S. 207.

Certainly it would appear that all the respondent distributors concurred and acquiesced in the split system (A. 329). There can be no doubt, at least, that this was true of Warner, Universal and Allied Artists who licensed their first run pictures exclusively pursuant to the split, during periods when they were not permitting petitioner to bid (A. 362, 384-385, 435-437, 546-549).

FOOTNOTE. Horizontal And Vertical Restraints Of Trade: The Legality Of Motion Picture Splits Under The Antitrust Laws. 75 Yale L. J., 239 (hereinafter cited as RESTRAINTS), at p. 252.

It is submitted by petitioner that the split system in this case was clearly a per se violation of the Sherman Act. However, the split system did not stand alone, and was integrally with the rejection of petitioner's superior bids. When petitioner's bids were rejected, the split system effectively guaranteed that the vast majority of those pictures would be licensed to the respective respondent exhibitors according to the split. The Ambassador and State Theatres being licensed 70% and 80%, respectively, of the distributors' pictures on their split, when petitioner's superior bids were rejected. Whatever the result in *Viking*, supra, in the instant case it is clear that petitioner suffered direct impact and damage from the split system. Nor should the split system be considered separately from the rejection of petitioner's superior bids and the refusal to permit bidding, since the District Court should have viewed the character and effect of the alleged conspiracy as a whole. See: *Continental Ore v. Union Carbide Corp.*, 370 U.S. 690, 698-99. The split system clearly appears is a per se violation of the antitrust laws on its face. However, under any interpretation of the law, it would seem beyond dispute that the split system in effect in this case at least constituted evidence of conspiracy which raised a genuine issue of material fact.

In addition the split of product in this case is in defiance of the provisions of the decree in *United States v. Paramount Pictures, Inc.*, 70 F. Supp. 73. As part of its efforts to terminate the national conspiracy, favoring affiliated circuits of theatres and other large circuits of theatres which it found to exist in that case, the District Court, in furtherance of this Court's opinion (334 U.S. 131), ordered the divestiture of theatres by the producers and distributors. For the obvious purpose of stimulating competition and eliminating the anti-competitive practices condemned in the *Paramount* case, American Broadcasting-Paramount Theatres, Inc. (originally named United Paramount Theatres, Inc.), was required by the Paramount decree to give up a minimum of two theatres in Raleigh, and one of the theatres divested

was the State Theatre. In bald defiance of the decree, rather than stimulating competition for first run pictures in Raleigh, the State Theatre was divested by respondent North Carolina Theatres to respondent Key Theatres controlled by a former employee (Hugh Smart), a brother of an executive of respondents Wilby-Kincey and North Carolina Theatres, and an agreement was made between the respondent exhibitors not to compete with each other, thus eliminating the very competition which the decree was specifically striving to foster. See Appendix G. Ten years later, at the time petitioner was forced out of business, the split between the defendant exhibitors was still in effect.

On the present state of the law there is a serious need for an authoritative decision by this Court dealing with splits of product. This Court's per curiam opinion in *Viking*, supra, affirming " . . . the Court of Appeals decision left the opinion below as another landmark in the continuing antitrust litigation over the legality of splits." (RESTRAINTS, supra, page 240). That decision has now been followed in the instant case by the Fourth Circuit, even where petitioner's fact situation is much stronger than *Viking*. "Judge Palmieri's rule and the Third Circuit's rule despite their dubious origins are now the law of the land. Seldom has the law on so important a subject been so obscure." (RESTRAINTS, pages 245-246). It is respectfully submitted that in the absence of an authoritative decision by this Court quite certainly the decisions of the Third and Fourth Circuits will be held by other courts to legalize division of market between competitors in the motion picture industry, and in other industries, and that it is important to the future course of competition in all industries that this Court clarify the question of the legality of the split system.

4. If this decision is allowed to stand, it will give motion picture distributors a *carte blanche* to discriminate and conspire in favor of large circuits by instituting *"sham"* competitive bidding, while an independent exhibitor injured by

that conspiracy will be left completely without recourse in the Courts.

The effect of the holding of the courts below to grant conspiring distributors and exhibitors complete immunity from a private treble damage action by an independent exhibitor, provided that the distributor goes through the formality of instituting competitive bidding. According to the Fourth Circuit once competitive bidding is instituted by the distributor, a comparison showing the superiority of an injured exhibitor's bids is without probative effect and is merely "speculation or conjecture" (A. 218).

In an unprecedented series of landmark cases in the 1940's this Court attempted to free the motion picture industry of many abuses which stifled competition and crushed the independent exhibitor. *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251; *Interstate Circuit, Inc. v. United States*, 306 U.S. 208; *Schine Chain Theatres v. United States*, 334 U.S. 110; *United States v. Crescent Amusement Co.*, 323 U.S. 173; *United States v. Griffith*, 334 U.S. 100; *United States v. Paramount Pictures, Inc.*, 334 U.S. 131. These decisions demonstrated violations of the antitrust laws motivated by concentration of monopoly power, and motivation of distributors to favor large affiliated and non-affiliated chains of theatres.

However, the motivation of the motion picture distributor to favor the large circuit operator is still present today, despite elimination of the above-mentioned competitive abuses. As Conant in his treatise on "Antitrust in the Motion Picture Industry," commented with regard to the same American Broadcasting-Paramount Theatres, Inc. that controls the respondents Wilby-Kincey and North Carolina Theatres in this case:

> "The Buying power of large circuits in dealing with distributors remains a crucial issue in spite of divorce-

> ment and some individual divestitures. Does not the bargaining power of the entire circuit (100 theatres of Loew's or 500 of American Broadcasting-Paramount Theatres) stand behind the booking for each of its theatres?" Conant, Anti-trust In The Motion Picture Industry 144 (1960).

If an independent exhibitor wishes to obtain first-run pictures in competition with a chain operator, his only recourse is to request competitive bidding from the distributor. If the distributor, motivated by the circuit buying power of the chain operator, discriminates against the independent exhibitor in the conduct of competitive bidding, it would be rare that it could be proven by direct evidence. Consequently, the only method of proving the conspiracy would be to show rejection of the independent exhibitor's superior bids. This would be done by comparing the theatres, the percentage terms, the length of playing time, and the guarantee, if any, on the respective bids, since those are the factors which the distributors themselves admit should fairly be considered in determining the superior bid (A. 302-304, 353-354, 350, 427).

This is exactly the procedure followed by petitioner in this case, in offering evidence of rejection of 153 superior bids. On each of the pictures petitioner had offered longer playing time and higher percentage terms, or both. Yet the court below has ruled as a matter of law that this comparison is not evidence of conspiracy, but is only "speculation or conjecture" (A. 218), stating that petitioner " . . . has attempted to raise an issue of genuine fact by his theory that he has submitted superior bids for the motion pictures, but this is without legal force and amounts only to speculation or conjecture, and he would not be allowed to go to the jury based upon such contentions." (A. 218). Yet what the court below calls petitioner's "comparison technique" (A. 217) is the only proper method of determining the superior bid, since it involves the very criterion distributors would use if acting

free from conspiracy. This same longer playing time and higher percentage terms which the courts below reject as "speculative" (A. 215, 218) are factors which representatives of respondent distributors admit are important in determining the best bid (A. 350, 427). For example, if the respondent MGM recognized that petitioner's bid of 50% more playing time and higher percentage terms represented a better bid on DON'T GO NEAR THE WATER, and the film rental paid showed the correctness of the award to petitioner's Colony (A. 302-304), it is equally clear that the longer playing time and higher percentage terms constitute superior bids on the 153 pictures listed in petitioner's Second Affidavit (A. 77-154). See comparative terms on some of those bids in Appendix D.

Despite the heavy reliance of the court below on *Viking*, supra, in that case there was extensive cross-examination of plaintiff's witnesses in open court, and plaintiff's proof of rejected superior bids was narrowed down to a total of nine "arguably superior bids" among all distributors (Id. at 295). Petitioner's claim of proof of conspiracy based on those rejected bids in *Viking* was never before this Court, since on certiorari in *Viking* the issues raised related chiefly to the *per se* illegality of split of product. The Third Circuit's decision in Viking probably holds only that the particular comparison of bids (nine "arguably superior"), offered in that case was not probative of conspiracy. The courts below in this case have held that *any* comparison of bids is "speculation or conjecture" and not probative of conspiracy. The significance of this decision to the motion picture industry cannot be overstressed. It is the first decision of any Circuit Court dealing squarely with substantial documented evidence of unfair competitive bidding, and holding that such comparisons of bids as a matter of law are "speculative" and not probative of conspiracy. The decision if allowed to stand may be followed by other Circuit Courts. The result will be that an independent exhibitor injured by a conspiracy involving competitive bidding, will be deprived of the only practical

method of proving that conspiracy, and would be completely without recourse in the courts.

5. Certiorari should be granted here in the interests of antitrust enforcement and of lightening this Court's burden in that respect. Most antitrust cases reaching this Court are instituted by the Department of Justice and come by way of direct appeal under the Expediting Act, 15 U.S.C. §29. In these cases there is no advantage of an intermediate appeal which usually narrows the issues and simplifies the record. The number of such cases brought by the Government will tend to diminish to the extent that the antitrust laws can be vigorously enforced through private antitrust actions.

In antitrust law, more than in most areas, individual judges tend to have preconceived, even if unconscious, economic opinions. The jury system serves as a safeguard against the subversion of antitrust law administration of any such personal economic philosophy. It is rare that conspiracy in a private antitrust case is shown by direct evidence, and yet an individual judge because of his own personal economic predilections may simply be blind to the probative effect of circumstantial evidence. This Court emphasized " . . . that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot . . . " *Poller v. Columbia Broadcasting System, Inc.*, supra, at page 473. Both courts below ignored this.

The importance of the role of this Court in stimulating private antitrust enforcement is demonstrated by the history of litigation in the motion picture industry over the past three decades. In a long series of landmark cases beginning at least as early as *Interstate Circuit, Inc. v. United States*, in 1939, supra, and culminating with *United States v. Para-*

mount Pictures, Inc., 334 U.S. 131, in 1948. FOOTNOTE. This Court endeavored to rid the motion picture industry of conspiracy, monopoly, and restrictive anti-competitive practices, usually favoring affiliated exhibitors or other large circuit operators, and crushing the competition of the small independent exhibitor. That these decisions were successful in paving the way for private antitrust enforcement is evidenced by the literally hundreds of private antitrust cases filed by independent exhibitors in the almost two decades since 1948. In that period it has not been necessary for this Court to intervene with another authoritative decision on industry practice.

Now, however, the point has again been reached where there is a serious need for a decision by this Court on restrictive and anti-competitive industry practices. Competitive bidding is the *modus vivendi* in the motion picture industry for the independent exhibitor who desires an equal opportunity to compete, and splits of product have become extremely prevalent. FOOTNOTE. Yet the courts below have aborted long established principles of antitrust enforcement, and left the exhibitor injured by conspiracy relating to competitive bidding or split of product completely without recourse in the courts.

If this decision is allowed to stand, it will undoubtedly be followed by other Circuit Courts. This is emphasized by the heavy reliance placed by the courts below in this case on the Third Circuit's opinion in *Viking*, supra, notwithstanding the evidence of 153 superior bids here as opposed to only nine "arguably superior" in *Viking*, and the more direct injury

---

FOOTNOTE. Bigelow v. RKO Radio Pictures, Inc., supra (1946); United States v. Crescent Amusement Co., supra (1948); United States v. Griffith, supra (1948); Schine Chain Theatres v. United States, supra (1948).

FOOTNOTE. "Splits are the prevailing mode of market allocation for film product. And thus far the isolated judicial reaction to splits has been puzzling." RESTRAINTS, supra, at page 241.

from the split of product in this case. Therefore, the motion picture exhibitor injured by this discriminatory competitive bidding or split of product, whose proof is based on circumstantial rather than direct evidence, is deprived of his private remedy. Respondent distributors, whose " . . . proclivity for unlawful conduct . . . " has been pointed out by this Court (*United States v. Paramount Pictures, Inc.*, supra, at page 148), will be granted complete immunity from the private treble damage action. It would be expected that the effect of this decision would overlap and serve as a precedent in other industries where competitive bidding or market division exists. Naturally, it would be impossible for the Department of Justice to take the place of the private treble damage plaintiff and police unfair competitive bidding practices and market divisions throughout the country. The burden which would be placed upon the Department, if it were required to make even a cursory surveillance on a nationwide basis, is demonstrated by the detailed summarization of bids contained in petitioner's 2nd affidavit, which represents only the final work product after intensive study and inspection of documents (A. 77-154). Significantly, this is competitive bidding in only one town. An impossible burden would be placed on the Department, and subsequently upon this Court. Certiorari should be granted in this case in the interests of preservation of the remedy of the private antitrust litigant, and the vigorous and active enforcement of the antitrust laws.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be granted.

Respectfully submitted,

MILTON BORDWIN
W. BRADLEY RYAN
Counsel for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 11,298.

James Seago,
Appellant,
versus
North Carolina Theatres, Inc., Wilby-Kincey Service Corporation, Paramount Film Distributing Corporation, Metro-Goldwyn-Mayer, Inc., Twentieth Century-Fox Film Corporation, Universal Film Exchanges, Inc., Warner Bros. Pictures Distributing Corporation, United Artists Corporation, Allied Artists Southern Distribution Corporation, and Key Theatres, Inc.,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA, AT RALEIGH.
JOHN D. LARKINS, JR., DISTRICT JUDGE.

(Argued June 23, 1967. Decided September 25, 1967.)

Before SOBELOFF, BOREMAN and BRYAN, Circuit Judges.

W. Bradley Ryan (Guterman, Horvitz & Rubin; Franklin T. Dupree, Jr., and Dupree, Weaver, Horton, Cockman & Alvis on brief) for Appellant, and Fred B. Helms and Charles F. Young (James B. Lovelace and Kenneth C. Royall on brief) for Appellees.

PER CURIAM:

The judgment is affirmed on the District Court's opinion, ___ F. Supp. ___ (E.D.N.C. 1967).

Affirmed.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

NO. 1341 — CIVIL

JAMES SEAGO,
Plaintiff
v.
NORTH CAROLINA THEATRES, INC.;
WILBY-KINCEY SERVICE CORPORATION;
PARAMOUNT FILM DISTRIBUTING CORPORATION;
METRO-GOLDWYN-MAYER, INC.;
TWENTIETH CENTURY-FOX FILM CORPORATION;
UNIVERSAL FILM EXCHANGES, INC.;
WARNER BROS. PICTURES DISTRIBUTING CORPORATION;
UNITED ARTISTS CORPORATION;
ALLIED ARTISTS SOUTHERN DISTRIBUTION CORPORATION;
KEY THEATRES, INC.,
Defendants.

OPINION and ORDER Civ. O.B. #14, P. 4271

LARKINS: District Judge:

SUMMARY

This cause comes before the Court as a civil action for treble damages and arises from alleged violations of the Anti-Trust Acts of the United States (The Sherman Act, Title 15 U.S.C.A. Sections 1, 2 and 7; and The Clayton Act, Title 15 U.S.C.A. Sections 12, 15, 16 and 22). Plaintiff

alleged, upon filing the complaint on December 29, 1961, that three separate but related violations of the Anti-Trust Acts occurred causing him monetary damages for which he prays recovery. Jurisdiction in the Federal Court of the matters alleged is provided for in the Anti-Trust Acts and is not in dispute.

The nature of the three alleged violations of the Anti-Trust Acts may be summarized as follows: The first insists that a conspiracy of nationwide significance existed, during the period in suit (from 1953-1960), to monopolize and restrain interstate commerce and trade in the distribution of motion pictures and films for public exhibition; the second is an alleged local conspiracy to monopolize the distribution of motion picture films for exhibition in Raleigh, North Carolina; and the third is an alleged existence of a monopoly in the distribution, licensing and exhibition of films in Raleigh, North Carolina.

Defendants Columbia Pictures, Howco Productions and Consolidated, Inc., have been dismissed from the suit upon agreement of the plaintiff and to his prejudice.

The defendants presently remaining in the case have denied all the alleged violations of the Anti-Trust Acts and have pleaded Title 15 U.S.C.A. Section 15(b) in bar of any recovery for any actions occurring prior to December 29, 1957.

These defendants fall into three categories with some overlapping. The local Raleigh theatres, their owners and managers representing the Ambassador Theatre, the State Theatre, and the Village Theatre, are in the first category. Those in the second category are the distributors of films to the local theatres. The last or third category is composed of parent firms of national standing.

At the first scheduled pre-trial conference of this action,

all of the defendants moved for summary judgment of dismissal. In support of their motions, many affidavits and consolidated briefs were filed. Plaintiff replied to the motions and insisted that a proper response thereto could not be accomplished without completing discovery. The Court, therefore, allowed numerous depositions to be taken and all discovery to be completed. Thereafter, plaintiff James Seago submitted two affidavits for the purpose of opposing defendants' motions. Mr. Seago had previously submitted another affidavit which has been considered in opposition to the motions. Accompanying briefs have also been submitted.

Before the Court at this time for its consideration are the motions for summary judgment of dismissal filed by the remaining defendants.

FINDINGS OF FACTS

The defendant North Carolina Theatres, Inc., is a corporation duly organized by law and has its usual place of business in the City of Raleigh, North Carolina. For many years it has been engaged in the operation of the Ambassador Theatre, the Varsity Theatre and the Tower Drive-In Theatre, all in the City of Raleigh, North Carolina. For several years it has also been engaged in operating some fifty-five or more other theatres and in managing or supervising the operation of a number of other theatres in the State of North Carolina. Hereafter, it will be referred to as "North Carolina Theatres."

The defendant Wilby-Kincey Service Corporation (hereafter referred to as Wilby-Kincey) is a duly organized corporation with its principal place of business in Charlotte, North Carolina. It is engaged in the business of managing and supervising the operation of a large number of theatres in the States of North and South Carolina, including the Ambassador and Varsity Theatres and the Tower Drive-In Theatre in the City of Raleigh.

The former defendant Consolidated Theatres, Inc. (referred to hereafter as Consolidated) is a corporation duly organized with Raleigh, North Carolina as its principal place of business. For many years it has been engaged in the operation and management of the Village Theatre and the Forest Drive-In Theatre in the City of Raleigh and various other theatres in North and South Carolina. Defendant Consolidated sold the Colony Theatre to plaintiff Seago in 1953. Consolidated has compromised and settled plaintiff's claim against it.

The defendant Key Theatres, Inc. is a corporation duly organized in North Carolina which transacts business in the City of Raleigh. It has been engaged in the operation and management of the State Theatre in the City of Raleigh and one other theatre in the State of North Carolina.

The remaining defendants are all corporations duly organized by law and have their principal places of business in the City and State of New York and transact business in the Eastern District of North Carolina. The defendants Metro-Goldwyn-Mayer, Incorporated (formerly Loew's, Incorporated), Twentieth Century-Fox Film Corporation and the former defendant Columbia Pictures Corporation are now and for some time have been engaged in the business of producing and distributing motion picture films; and the other corporations (except the defendant exhibitors) are now and have been engaged in the business of distributing said films. Hereafter, said corporations will be referred to as the "defendant distributors" and will be designated respectively by the names by which they are generally known in the trade: Paramount, MGM, Fox, Warner, United Artists, Universal, Columbia, Howco (which has been dismissed from the action), and Allied Artists.

For many years the defendant distributors have distributed not only a great majority of the motion picture films produced each year in this country, but also a large portion of the only films having any commercial value.

Plaintiff James Seago was the operator of the Colony Theatre in Raleigh, North Carolina, from 1953-1960, inclusive. In 1953, Seago purchased the equipment and machines then in the Colony Theatre for $7,500.00. After he purchased the theatre, he alleges that he spent an additional $15,000.00 for improvements made to the theatre. At the time he commenced operation, he alleges that he had eighteen years of paid employment in the motion picture business. His former duties consisted of being a projectionist for Wilby-Kincey in Fayetteville, North Carolina, starting in 1942. He states that during this employment he assisted in making the running schedules, newspaper ads, box office reports and inventories. After serving in the armed services, Seago started college but soon thereafter returned to the employment of Wilby-Kincey in Lumberton, North Carolina. Plaintiff Seago alleges in his complaint that prior to 1953 the defendants and various other persons and corporations entered into unlawful combination and conspiracy to restrain and to monopolize interstate commerce and trade in motion picture films. He further alleges that the purposes of the combination and conspiracy were to limit and control the distribution and exhibition of motion picture films in interstate commerce; to adopt and to put into effect a nationwide system of structures and runs, clearances and admission prices; (with the exception of United Artists) to adopt and put into effect the practices of block booking and blind buying; by means of franchises, master contracts, formula deals and other methods and means, to grant to controlled theatres privileges and preferences not granted to independent theatres, including the said theatre operated by the plaintiff; and to minimize, suppress and eliminate the competition of independent distributors and exhibitors. Seago alleges in his complaint that pursuant to the combination and conspiracy, the defendants and other persons have engaged in the practices and entered into the agreements and committed the acts herein alleged. He states that the defendants have maintained a uniform system of runs, clearances and admission prices for motion picture

theatres and that the defendant distributors have declined to contract with or to deliver films to the plaintiff except in accordance with the said system. He further states that the clearance was an unreasonable protection. Seago alleges that the defendant distributors have discriminated against the plaintiff in the following particulars:

1. they have granted moveover privileges;

2. they have given special concession in film rentals and special reductions in the license fees charged to the plaintiff's competitors;

3. they have charged the plaintiff excessive license fees;

4. they have failed to deliver films in violation of the contract between the plaintiff and the distributors;

5. they refused to license first-run films to Seago unless he would bid with theatres that were not in substantial competition with him;

6. they conducted competitive bidding between the plaintiff and the defendant exhibitors in such a manner that irrespective of the value of the plaintiff's bids as compared to those of the defendant exhibitors, the plaintiff was unable to secure films for which he had bid;

7. they permitted the defendant exhibitors to exhibit its films without a formal written contract or license agreement and to exhibit films on a "terms later basis."

Plaintiff alleges that the defendant exhibitors have exercised their circuit buying power to induce or coerce the defendant distributors in supplying first-run pictures to the exclusion of the plaintiff. According to Seago, the defendant exhibitors

and defendant distributors have ignored the system of competitive bidding, and the defendant exhibitors have paid excessive film rentals in order to keep the plaintiff from getting films. Seago alleges that the above-mentioned acts of the defendants were carried out in an attempt to secure a monopoly in the exhibition of first-run films in the City of Raleigh. Plaintiff further states that the above-mentioned acts of the defendants have been successful in that he became financially embarrassed and was unable to pay his obligations. In the third count of his complaint, Seago alleges that the defendant exhibitor Wilby-Kincey has entered into master agreements with the defendant distributors and has exercised its circuit buying power. Also, in count three, the plaintiff complains that the defendant exhibitors have secured from the defendant distributors the privileges and preferences specified in earlier parts of this opinion.

CONCLUSIONS OF LAW

Defendants have made motions for summary judgment. Plaintiff resisted the motions and claimed that he had not had adequate time in which to finish his discovery, and for that reason the motions were continued until such time as the plaintiff could complete his discovery. Plaintiff, through counsel, has taken numerous depositions of persons involved in the motion picture industry. These depositions run to many hundreds of pages. At the close of all discovery, defendants renewed their motions for summary judgment which are now before the Court. In support of their motions they have filed numerous affidavits which are all basically the same; that is to say, that there have not been any of the practices as alleged in the plaintiff's complaint. Plaintiff has objected to these affidavits as stating conclusions, as being mere general denials, as attempting to draw fallacious conclusions, and as being insufficient to shift any burden to the plaintiff. The Court agrees in part with the plaintiff in that the affidavits are full of conclusions and general denials, but this does not mean that the defendants' affidavits are to be

thrown out and cast aside as these affidavits also state evidential facts as required by Rule 56(e) of the Federal Rules of Civil Procedure. This Court, therefore, holds and decides that these affidavits were in fact sufficient to cause the plaintiff to go forward with affidavit or other means to show evidentiary facts as required by the Federal Rules. Even if the affidavits were not sufficient, this would not prevent the Court from granting summary judgment. Rule 56(e) of the Federal Rules of Civil Procedure permits a motion to be made without supporting affidavits, and Rule 56(c) contemplates that the Court shall consider the "pleadings, depositions, and admissions on file, together with affidavits, if any." *Hoston v. J. R. Watkins Company,* 300 F.2d 869 (9th Cir., 1962). It is also important to note that in the Hoston case, supra, that the ruling was made completely on the plaintiff's depositions which he had taken of the defendant's employees. Defendant's only affidavit in that case was legally insufficient. See also *Pen-Ken Gas and Oil Corp. v. Warfield Natural Gas Co.,* 137 F.2d 871 (6th Cir., 1943), *Jeffress v. Weitzman,* 221 F.2d 542 (D.C. Cir., 1955). Besides the affidavits presented by the defendants, there are also the depositions taken by the plaintiff which do not support his claims but in fact support the contentions of the defendants. Plaintiff must, therefore, go forward and produce evidentiary facts which will in fact support the contentions raised in his voluminous complaint and briefs. This has not been done.

The Motions now pending before this Court were filed pursuant to Rule 56 of the Federal Rules of Civil Procedure and more particularly Rules 56(c) and 56(e), which provide as follows:

> "(c) *Motion and Proceedings Thereon*
>
> The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits.

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . ."

"(e) *Form of Affidavits; Further Testimony; Defense Required.*

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him. As amended Jan. 21, 1963, eff. July 1, 1963."

Defendants have conceded in their brief that prior to the effective date of the amendment that plaintiff in some jurisdictions, such as the Third Circuit, might have raised an issue of fact merely by filing an affidavit saying that defendants' contentions were wrong or even on his pleadings alone, but they claim that this situation no longer prevails. Plaintiff is now required, based upon personal knowledge, to set forth such facts as would be admissible in evidence and show that he is competent to testify with respect to such

matters. Rule 56(e) of the Federal Rules of Civil Procedure was amended to take care of a too rigid standard on motions for summary judgment and to enable the Court, after extensive pre-trial discovery proceedings, to dispose of litigation without the necessity for a protracted trial. This is plainly set forth in the Advisory Committee's Notes with respect to the last two sentences in Rule 56(e), which constitute the amendment to that section of the rule in 1963. Those notes read, in part, as follows:

> "The last two sentences are added to overcome a line of cases, chiefly in the Third Circuit, which has impaired the utility of the summary judgment device. A typical case is as follows: A party supports his motion for summary judgment by affidavits or other evidentiary matter sufficient to show that there is no genuine issue as to a material fact. The adverse party, in opposing the motion, does not produce any evidentiary matter, or produces some but not enough to establish that there is a genuine issue for trial. Instead, the adverse party rests on averments of his pleadings which on their face present an issue. In this situation the Third Circuit cases have taken the view that summary judgment must be denied, at least if the averments are 'well pleaded,' and not suppositions, conclusory, or ultimate." (citations omitted)
>
> "The very mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial. The Third Circuit doctrine, which permits the pleadings themselves to stand in the way of granting an otherwise justified summary judgment, is incompatible with the basic purposes of the rule. See 6 Moore's Federal Practice 2069 (2ed. 1953); 3 Barron and Hotlzoff, supra, Sec. 1235.
>
> "It is hoped that the amendment will contribute to

the more effective utilization of the salutary device of summary judgment."

In *Waldron v. British Petroleum Co.*, 38 F.R.D. 170 (S.D.N.Y. 1965), a private anti-trust case, the defendant Cities Service Co. initially made a motion for summary judgment in 1960 under Rule 56(e) of the Federal Rules of Civil Procedure on the ground that plaintiff had failed, in his affidavits, to set forth specific facts showing that there was a genuine issue for trial. This motion was adjourned for the purpose of enabling plaintiff to conduct limited pre-trial discovery. The Court said at that time "(t)he naming of Cities Service Co. as a defendant herein when the complaint was drawn was based only on suspicion and on a gossamer inference drawn from the mere sequence of events." The Court in the Waldron case went further and said that "the single issue before the court relating to Cities' motion for summary judgment is whether plaintiff's discovery has unearthed a 'genuine issue (of fact) for trial' where nothing had existed before but suspicion and gossamer inference drawn from the mere sequence of events."

> "The crucial facts which plaintiff must produce in order to survive Cities motion for summary judgment are evidentiary data tending to prove that Cities became a party to the alleged conspiracy. These evidentiary data have not been forthcoming. Even the 'gossamer inference' that existed in 1961 has become attenuated into nothingness as a result of the pre-trial record developed during the last four years."

The Court concluded by saying:

> "The case against Cities has gone far enough. More than five years have elapsed since Cities first made this motion for summary judgment. Plaintiff has had ample time and opportunity to discover and present concrete particulars demonstrating that there is a genuine issue

for trial. At this late day plaintiff still cannot point to specific facts or evidentiary data."

Judge Herlands in the Waldron case, supra, relief on *Dressler v. MV Sandpiper,* 331 F.2d 130 (2nd Cir., 1964), and *Scolnick v. Lefkowitz,* 329 F.2d 716 (2nd Cir., 1964). In the Scolnick case, plaintiffs alleged a conspiracy to violate their civil rights and their constitutional rights by placing them in a mental institution. The district court granted summary judgment as to the alleged conspiracy to violate the statute. The Court said:

> "(W)hile plaintiffs vaguely assert that the defendants departed from the scope of their official duties in a conspiracy to incarcerate them illegally in a mental institution, Judge Murphy's award of summary judgment as to this allegation was clearly proper. Defendants' detailed affidavits, categorically denying the existence of such a conspiracy — and, in the case of Lefkowitz, denying knowledge of the plaintiffs' very existence — were sufficient to require the plaintiffs to 'set forth specific facts showing that there is a genuine issue for trial' under the recent amendment to rule 56(e)."

In *Dressler v. MV Sandpiper,* 331 F.2d 130 at 133 (2nd Cir., 1964), the Court said "(T)he highly general assertions of Fanale's answer to the libel, buttressed by no specific facts or evidentiary data, are hardly the sort of concrete particulars which the amendment sought to require." Although this case dealt with Rule 58 of the Admiralty rules, the Court in the above-quoted passage was referring to Rule 56 of the Federal Rules of Civil Procedure, which the Court called a carbon copy. It is important to note that the sufficiency of the allegations of a complaint do not determine the motion for summary judgment, for if this were the case, Rule 56 would be a nullity for it would merely duplicate the motion to dismiss. *Lindsey v. Leavy,* 149 F.2d 899 (9th Cir., 1945).

It now becomes necessary to decide if the plaintiff by his own affidavits and the depositions of the defendants' employees, both former and present, has raised any issue of material fact which would defeat the motions for summary judgment. Plaintiff's first affidavit states that it was the purpose of the plaintiff to run the Colony Theatre as a "first-run theatre," and that the Colony was qualified to be a first-run theatre. Plaintiff's second affidavit states that it is his opinion, based on his experience, that he had made superior bids on a large number of pictures which were awarded to defendant exhibitors. In his third affidavit, he states his qualifications to rate the pictures as to his superior bids and goes on to classify various pictures upon which he had bid. Plaintiff has mentioned the alleged preferences or concessions which he so strongly insists happened in his complaint, but he has not alleged facts which would support these allegations.

Plaintiff cites as additional evidence of a conspiracy the denial of the right to bid for certain periods of time. Taking the depositions as true, which recite that competitive bidding was discontinued for periods of time during the time in which Seago ran the Colony Theatre, this does not in itself establish that there was in fact a conspiracy, nor is it evidence of a conspiracy. Plaintiff does not introduce facts which would show that the bidding was discontinued because of any common plan or design.

In *Brown v. Western Massachusetts Theatre, Inc.*, 288 F.2d 302 at 304 (1st Cir., 1961), the Court said:

> "... We have no doubt, however, that a jury could have concluded that competitive bidding by the particular distributors in question was not always what it purported to be, or concluded that, in the instances shown, plaintiff's bids were not considered on an equal footing with defendant's. But the real issue is what legal significance could be attributed to such a finding. To determine this the status of competitive bidding in the motion-picture

> industry is a necessary background. In United States v. Paramount Pictures, Inc., 1948, 334 U.S. 131, 161-166, 68 S.Ct. 915, the court set aside that part of the district court's decree which required first-run films to be distributed among exhibitors according to a competitive-bidding system. To a large extent the court's holding in this respect was based on its belief that it would often be impossible to evaluate the bids, and equally difficult to determine when a distributor's preference of one exhibitor over another, for reasons not appearing on the face of a bid, was an exercise of valid business judgment and not the result of illegal favoritism. Id., 334 U.S. at page 163, 68 S.Ct. at page 932. Of course this is not to question that competitive bidding is one acceptable method of distributing films for exhibition. But cf. id. 334 U.S. at pages 164-165, 68 S.Ct. at pages 932-933. It does indicate, however, why a departure from competitive bidding does not in itself constitute or prove a violation, and cannot be helpful to the plaintiff unless he can rationally relate it to other conduct by the alleged conspirators."

Plaintiff has inserted the idea that the lack of competitive bidding at all times is in fact evidence of a conspiracy. This Court disagrees. Producers and distributors of motion picture films are not required to license their products to every exhibitor who desires or requests them. "An exhibitor does not have the absolute right to compel producers and distributors to furnish him films or to give him the privilege of exhibiting them on the basis of any specified run." *Loew's Inc. v. Cinema Amusements, Inc.*, 210 F.2d 86 at 92 (10th Cir., 1954), certiorari denied in 347 U.S. 976. Plaintiff, through counsel, admits in his brief that the defendant Universal discontinued bidding in May 1959. Plaintiff claims that it is a question for the jury as to whether or not Universal discontinued bidding because Seago owed the money or because this was a part of the conspiracy against him. Plaintiff alleges by brief that defendant Allied Artists, despite written re-

quests for competitive bidding by the plaintiff in 1954, 1955 and 1957, did not allow the plaintiff the right to bid for first-run films in Raleigh until about August 30, 1960. As previously mentioned, defendant Universal discontinued bidding in May 1959 through the closing of plaintiff's theatre in December 1960. The plaintiff alleges that he was deprived of the right to bid for Fox pictures first-run in Raleigh on October 3, 1960. The plaintiff further alleges that the defendant distributor Warner did not allow plaintiff the right to bid for first-run films in Raleigh until December 21, 1954, almost 18 months after plaintiff opened his theatre. Competitive bidding was in effect from December 21, 1954 until April 23, 1958, with defendant Warner, when it was discontinued as to the plaintiff Seago. Defendant Warner alleges that it was discontinued because of the failure of the plaintiff to bid on fourteen pictures. Plaintiff alleges that he was allowed to bid again after February 4, 1959, after writing a letter to the Attorney General's office complaining about not being allowed to bid. Taken as true, plaintiff only establishes that he was not allowed to bid on pictures at different times during the period from 1953 to 1960, inclusive. This does not establish conspiracy or even evidence of a conspiracy standing alone. Plaintiff admits that when competitive bidding was not in effect the pictures were licensed by negotiation, although he does claim that he was not allowed to negotiate for films. Even though competitive bidding was in effect for a majority of the time during the period from 1953 through 1960, it was discontinued at different times by different distributors. Plaintiff has not produced any evidence which would show that the discontinuance of bidding by the different distributors was anything other than the independent and uninfluenced choice of each distributor, and there is nothing illegal about the discontinuance of competitive bidding so long as it is not the result of a common plan to monopolize the trade or industry or otherwise violate the anti-trust laws.

Plaintiff further alleges that there is evidence of the circuit buying power of the defendant exhibitors Wilby-Kincey,

North Carolina Theatres, and Consolidated Theatres. Plaintiff alleges that this fact is established by the depositions of the representatives of Consolidated and Wilby-Kincey, and the representatives of MGM, Universal, Paramount, Warner and the former defendant Columbia. In substance, the depositions indicated, according to the plaintiff's allegation, that a representative of the particular defendant distributor would go to the office of the defendant exhibitor and attempt to license whatever pictures were available to substantially the theatres where the distributor regularly sold his product, if possible; and that frequently, as a result of a particular day's negotiations, a deal would be made to license a picture of that defendant distributor for exhibition at a large number of the theatres of the defendant exhibitor. John W. Kirby testified in his affidavit that he would attempt to sell as many pictures as he could, theatre by theatre, town by town, with the particular organization. The testimony revealed in the other depositions was to the same effect. Plaintiff attempts to claim that this is evidence of circuit buying, but again this Court does not agree. One would not expect the distributors' representative to attempt to license just one picture at each trip to the buyer's office. He would not be expected to license one picture, leave the office, walk around the block and then come back into the office and license another picture. The mere fact that the distributors and the exhibitor or his buying agent licensed more than one picture for more than one town at one sitting is not per se conspiracy or even evidence of a conspiracy. Again, there does not appear to be any evidence of a common plan, scheme or common design, but just the fact that the operations were carried out in the most economical way possible. Block buying, as the plaintiff insists, is illegal per se, but this does not mean to say that films may not be licensed more than one at a time. Block buying becomes illegal only when there is a requirement that the individual buyer purchase or license one film in order that he be able to license another, but films may be sold in blocks or groups where there is no requirement, express or implied, for purchase of more

than one film. *Krinsley v. United Artists Corp.*, 119 F.Supp 665 (N.D. Ill. 1954), *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948).

Plaintiff also alleges as evidence of a conspiracy that there was a substantially uniform structure of runs and clearances in effect in Raleigh on the products of the defendant distributors and the defendant exhibitors. Plaintiff, in his brief, through counsel, states:

> "It should be noted that the statements in paragraph 3 that there were no move-over runs, franchises, master agreements, master contracts, or blanket deals, or formular deals is also, of course, factual. However, those particular practices are only background to the present conspiracy, and have not been relied upon by plaintiff with regard to the conspiracy charged. . . . The plaintiff has no knowledge of the existence of particular practices such as blind buying, block booking, or franchises any place in the country after 1950, because those particular practices were eliminated after the Paramount case."

Plaintiff's Reply Brief in Opposition to Motion of Defunct Defendant for Summary Judgment, Page 9, Transcript of Motion Hearing, p. 66.

Plaintiff claims that the uniform structure of runs is to be considered as evidence of a conspiracy along with his previous contentions. In his third affidavit he says that there is a substantially uniform system ranging from a minimum of 30 days clearance to a maximum of 45 days, depending on the particular distributor. In his brief he says that the defendant Paramount had in effect a 42-day clearance during the period 1954-1957, which was subsequently changed to 35 days; the former defendant Columbia had a 45-day clearance in the 1959-1960 season. The defendant Fox had a 35-day clearance in 1956, and it was still in effect in 1960. The defendant Warner had in effect a 30-day clearance in 1957. Plaintiff

also attempts to make a point of the desire of Wilby-Kincey and North Carolina Theatres to have as long a clearance as possible on the pictures exhibited first-run at the Abassador, as illustrated by the statements of Roy Smart; that a 35-day clearance was barely reasonable; and that he would like to have had more clearance. There is nothing illegal per se about a clearance so long as it is reasonable. In all the depositions taken by the plaintiff the testimony was to the effect that the clearances, which in fact did exist, were reasonable. Plaintiff cannot establish a conspiracy by the fact that clearances were in effect in the Raleigh area. He must show that they were in fact unreasonable, and that they were in fact used pursuant to a common plan or design to discriminate against the plaintiff. *Orbo Theatre Corporation v. Loew's, Incorporated,* 156 F.Supp 770 (D.C.D.C. 1957), affirmed in 261 F.2d 380 (D.C. Cir., 1958), certiorari denied in 359 U.S. 943 (1959), *Robbinsdale Amuse. Corp. v. Warner Bros. Pic. Dist. Corp.;* 141 F.Supp 134 (4th Div. Minn. 1955).

Plaintiff also claims that the fact there was a split product between the Ambassador Theatre and the State Theatre is evidence of a conspiracy. This alleged agreement was to the effect that the Ambassador would bid for the product of certain distributors and the State would not bid against them for this product. The State Theatre, in like effect, was to have the right of bidding for the product of certain distributors, with the Ambassador submitting bids against them. The agreement or the fact of common knowledge of the practice was denied in the depositions which were taken of the representatives of the organizations involved; however, taking the case in the light most favorable to the plaintiff as the Court is required to do on a motion for summary judgment, there is evidence from which it could be inferred that in fact there was a split product. For this reason, it becomes necessary to decide what effect, if any, a split product would have as being or not being evidence of a conspiracy. Plaintiff claims that the agreement, if in fact there was an agreement, had its

effect to limit competition among the motion picture exhibitors. Assuming arguendo, that this is true, it would not have damaged plaintiff since the effect would have been that the plaintiff would have had to bid only against the Ambassador or the State depending upon which distributor he was dealing with. It would have in effect made it easier for the plaintiff to obtain pictures since he would not have had to bid against as many exhibitors as he would have, had there been no split product. There is not any evidence that the effect of this split of product, if in fact there was a split, was to foreclose the plaintiff from being allowed to license films or to compete in the bidding and negotiation for the films. In *Viking Theatre Corporation v. Paramount Film Distributing Corp.*, 320 F.2d 285 at 292, 293 (3rd Cir., 1963), the Court said:

> "The plaintiff argues preliminarily that a split system, which, as here, does not include all exhibitors in the competitive area, constitutes a per se violation of the antitrust laws. It is not argued that all split systems are illegal; the substance of the plaintiff's argument is that those which do not include all exhibitors are per se illegal. We do not agree. We have heretofore noted that each exhibitor was at all times afforded the opportunity to license the pictures of each distributor notwithstanding the split. There is no evidence that any exhibitor requesting participation in the split of product would have been excluded.
>
> " . . . There is no evidence in this case that the split system, standing alone, had this effect, or was so intended. Therefore, we decline to hold the split system to be per se illegal, and we do not consider the system, standing alone, as evidence of a conspiracy to violate the antitrust laws."

The anti-trust laws do not require that a business cut its own throat.

The Viking case, supra, is very similar to the case at hand. It was an anti-trust action by the owner and operator of a motion picture theatre against the distributors and exhibitors of motion pictures. The District Court held for the defendant saying that the evidence failed to present a jury question as to whether the defendants were guilty of discriminatory conduct from which it could be inferred that a conspiracy existed. The evidence was declared legally insufficient and the Court directed a verdict for the defendants. Plaintiff had claimed that there was a routine rejection of his superior bids or offers and that this was evidence of a conspiracy. He claimed that he was required to offer excessive rentals as a prerequisite to being licensed films. He alleged that there was an adjustment of film rentals and playing time in favor of the defendants and the denial of similar adjustments, and that he was required to make extensive commitments as to playing time in order to license films. Plaintiff in this case alleges, as did the plaintiff in the Viking Theatre case, supra, that he submitted superior bids on pictures which were subsequently licensed to the defendant exhibitors. His claim rests upon the offer of longer playing time and a higher percentage of his gross receipts. He urges that it may be inferred from this fact that the distributors rejected his bids and offers with intent to injure him pursuant to a common scheme. The Court in the Viking Theatre case answering at page 295 these same contentions said:

> " . . . In our opinion, the comparisons failed to support the inference urged.
>
> "The technique employed to arrive at the comparisons can be afforded but little legal significance . . . The admission that plaintiff required substantially more playing time to achieve comparable grosses is not unimportant in an evaluation of the financial terms of competing bids . . . We note further that the comparison technique generally ignores such terms as the availability date and the length of playing time.

> "Another defect inherent in the comparison technique is its reliance upon a hindsight determination of the grossing power of films. . . .
>
> " . . . Plaintiff's claim of superiority, therefore, rests on pure conjecture."

In the Brown case, supra, 288 F.2d 302 at 305, the Court said in footnote 7:

> "Plaintiff constantly refers to the fact that it is theoretically possible for a small house to gross more than a large one on a given film by having a longer run. His argument, in addition to not having been testimonially connected to Greenfield, overlooks the fact that long runs delay the use of the print elsewhere."

If the evidence construed most favorably in behalf of the plaintiff would justify or require a directed verdict against him, the Court should enter summary judgment for the defendants. *Dulansky v. Iowa-Illinois Gas and Electric Co.*, 10 F.R.D. 566 (S.D. Iowa, 1950), *Dewey v. Clark*, 180 F.2d 766 (D.C. Cir., 1950). A popular formula is that summary judgment should be granted on the same kind of showing as would permit direction of a verdict were the case to be tried. *Sartor v. Arkansas Natural Gas Corporation*, 321 U.S. 620, 64 S.Ct. 724, 88 L.Ed. 967 (1944). The theory underlying a motion for summary judgment is substantially the same as that underlying a motion for a directed verdict. The essence of both motions is that there is no genuine issue of material fact to be resolved by the trier of facts. In accordance with the theory of a directed verdict, a court should not grant summary judgment where it could not properly direct a verdict although it might properly set aside a verdict as being against the weight of the evidence, and summary judgment should not be granted on the ground that if a verdict were rendered for the adverse party the court would set it aside. *Fuqua v. Deapo*, 34 F.R.D. 111

(W.D. Ark., 1964). It is important to note, however, that facts sufficient to preclude granting of summary judgment cannot be based on sheer speculation rather than the drawing of logical inferences. *Fiumara v. Texaco, Inc.*, 204 F.Supp 544 (E.D. Pa., 1962), affirmed in 310 F.2d 737 (1962). As the Court said in the Viking Theatre case, supra, 320 F.2d 285, at 296:

> "Because of the unsubstantial nature of the comparison technique employed and the equivocal results obtained by the application of that technique, we are of the opinion that it would be impermissible to allow a jury to draw the inference that the rejection of the plaintiff's bids resulted from an intent to discriminate. A jury is permitted to draw only those inferences of which the evidence is reasonably susceptible, and may not be permitted to resort to speculation. Therefore, we hold that the evidence was insufficient to support the claim that the distributors rejected superior bids of the plaintiff in furtherance of a common plan."

A mere scintilla of evidence is not enough to create an issue; there must be evidence on which a jury might rely. *McVay v. American Radiator & Standard S. Corporation,* 1 F.R.D. 677 (D.C. Pa., 1941), affirmed 119 F.2d 593 (1941). A party may not escape summary judgment on the mere hope that something will turn up at the trial.

Plaintiff has failed to raise a genuine issue of material fact in opposition to the motions for summary judgment by the defendants. He had not alleged evidentiary facts in his affidavits and the plaintiff's depositions do not raise the necessary issue of fact to resist the motion. He has attempted to raise an issue of genuine fact by his theory that he has submitted superior bids for the motion pictures, but this is without legal force and amounts only to speculation or conjecture, and he would not be allowed to go to the jury based upon such contentions. Plaintiff has attempted to raise other

issues of material fact in his allegations as to runs and clearances, split of product, circuit buying or block booking, but his evidence has not established any illegality or even evidence of a conspiracy by the facts as appear from this record, taking them in the light most favorable to the plaintiff.

Plaintiff has alleged many things which when taken with some other factors, which are lacking here, could be considered evidence of a conspiracy. He alleged runs and clearances are evidence of a conspiracy, but he has not alleged facts which would show that the runs and clearances were unreasonable. He has alleged a split of product, but he offers no proof to show that the Colony Theatre was foreclosed from entering into negotiations or the competitive bidding because of any split of product. He has alleged that there was evidence of circuit buying, but he does not show any proof that the licensing of one film was contingent upon the licensing of other films. Plaintiff's evidence does not show the required plus factor and, therefore, he has not raised a genuine issue of material fact.

Plaintiff has not offered any evidence of a common plan, scheme or design among the alleged conspirators. He has not offered any evidence which would allow him to prove conspiracy by similarity of conduct in that the record does not disclose evidence of a mutual awareness of action or conscious parallelism.

The plaintiff has presented a very forceful case in his complaint, but he has been unable to support his allegations by evidentiary facts as he must do to resist the motion for summary judgment. Plaintiff has used many of the stock phrases which have been identified with this type of action, but when the Court examines that part of his contentions which remain after disregarding that which is legally insufficient or mere surplusage, it becomes clear that his claim is without substance.

ORDER

Therefore, it is ORDERED AND ADJUDGED that the motions for summary judgment be and the same are allowed.

Enter: December 29, 1966.

JOHN D. LARKINS, JR.
United States District Judge

A True Copy Teste:

Samuel A. Howard, Clerk
By Joyce W. Todd
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

NO. 1341 — CIVIL

JAMES SEAGO,
Plaintiff
v.
NORTH CAROLINA THEATRES, INC.;
WILBY-KINCEY SERVICE CORPORATION;
PARAMOUNT FILM DISTRIBUTING CORPORATION;
METRO-GOLDWYN-MAYER, INC.;
TWENTIETH CENTURY-FOX FILM CORPORATION;
UNIVERSAL FILM EXCHANGES, INC.;
WARNER BROS. PICTURES DISTRIBUTING CORPORATION;
UNITED ARTISTS CORPORATION;
ALLIED ARTISTS SOUTHERN DISTRIBUTION CORPORATION;
KEY THEATRES, INC.,
Defendants.

JUDGMENT
Civ. O.B. #14, P. 4272

LARKINS: District Judge:

Upon the motions of the defendants for summary judgment, it appearing to the Court that there is not a genuine issue of a material fact for trial the Court after due deliberation now renders its decision and has made and filed its findings of fact, conclusions of law and order for judgment granting the motions for summary judgment.

It is, therefore, ORDERED, ADJUDGED and DECREED that the plaintiff take nothing by this action and the action is dismissed.

Entered this the 29th day of December, 1966.

JOHN D. LARKINS, JR.
United States District Judge

A True Copy Teste:

Samuel A. Howard, Clerk
By Joyce W. Todd
Deputy Clerk

APPENDIX C

PICTURES OF MGM, PARAMOUNT AND FOX PLAYING AMBASSADOR AND VILLAGE THEATRES WITH HIGHER CHARLOTTE AREA FILM RENTALS, BUT PAYING LESS FILM RENTAL THAN COLONY DID ON "HOUSEBOAT."

Picture	Distributor	Film Rental Paid	Charlotte Area Rental	Theatre
HOUSEBOAT	PARA.	4031	69.1	Colony
SAD SACK	PARA.	2760	79.6	Amb.
ROCK-A-BYE	PARA.	3010	78.0	Amb.
GEISHA BOY	PARA.	3850	79.8	Amb.
L'IL ABNER	PARA.	3610	98.9	Amb.
BELLBOY	PARA.	2025	71.5	Amb.
DON'T GIVE UP SHIP	PARA.	3250	78.6	Vil.
TUNNEL OF LOVE	MGM	3638	69.2	Vil.
DON'T EAT DAISIES	MGM	3882	94.1	Vil.
ADVENT. HUCK FINN	MGM	2616	74.6	Vil.
MARDI GRAS	FOX	4025	80.6	Amb.
INN 6TH HAPPINESS	FOX	2504	79.9	Amb.
JOURNEY CENTER EARTH	FOX	3772	101.2	Amb.

APPENDIX D

ABBREVIATED TABLE SUMMARIZING COMPARATIVE RENTAL TERMS ON 28 OF THE 153 REJECTED SUPERIOR BIDS OF PETITIONER DOCUMENTED IN PETITIONER'S 2ND AFFIDAVIT (A. 77-154)

NOTE: The summary of terms is based on firm playing time offered and firm percentage terms offered. A complete summary of terms and exhibition results appears in Petitioner's Appendix as noted on each picture. If a specific minimum dollar amount is offered in the bid it is listed in the column headed guarantee. Pictures listed on the table on which Petitioner's rejected bid offered both higher percentage terms and at least twice as long playing time, or more, are marked with an "asterisk — *." 135 other pictures on which Petitioner's rejected bid contains higher percentage or longer playing time, or both, than the theatre of the respondent exhibitors or consolidated to which it was awarded are documented in Petitioner's second affidavit.

Dist.	Title & Appendix Page	Theatre	Days Playing Time	Percentage Terms	Days for Which % Terms Apply	Guarantee
COLUMBIA	*THREE WORLDS OF GULLIVER (A. 130)	Colony	21	75%	1st Wk.	—
				60%	2nd Wk.	
				40%	After	
		State	6	25%	6	—
	*GENE KRUPA STORY (A. 130)	Colony	10	50%	10	—
		State	4	25%	4	—
	*BABETTE GOES TO WAR (A. 130-131)	Colony	14	60%	1st Wk.	—
				40%	After	
		State	7	35%	7	—
	*SURPRISE PACKAGE (A. 131)	Colony	21	70%	1st Wk.	—
				60%	2nd Wk.	
				40%	3rd Wk.	
		State	5	25%	5	—
	*LET NO MAN WRITE MY EPITAPH (A. 131)	Colony	21	75%	1st Wk.	—
				60%	2nd Wk.	
				40%	3rd Wk.	
		State	5	30%	5	—

Dist.	Title & Appendix Page	Theatre	Days Playing Time	Percentage Terms	Days for Which % Terms Apply	Guarantee
Fox	*High Time (A. 95)	Colony	21	65%	1st Wk.	—
				50%	After	
		Amb.	7	40%	7	$1200
	*South Pacific (A. 91)	Colony	14	50%	14	—
		Amb.	7	40%	7	—
	*Carousel (A. 86)	Colony	28	70%	1st Wk.	—
				70%	2nd Wk.	
				70%	3rd Wk.	
				50%	4th Wk.	
		Amb.	8	30%	8	—
	Barbarian & Geisha (A. 89)	Colony	12	50%	12	$1750
		Amb.	7	32%	7	—
Warner	*Face In The Crowd (A. 99)	Colony	14	60%		—
		Amb.	7	35%		—
	*The Nun's Story (A. 100)	Colony	14	60%	1st Wk.	—
				50%	2nd Wk.	
		Amb.	7	50%		—
Paramount	*Anything Goes (A. 102)	Colony	17	60%	10 Days	—
				50%	After	—
		Amb.	7	50%		$1650
	Rock-A-Bye Baby (A. 103)	Colony	14	70%	1st Wk.	—
				50%	2nd Wk.	
		Amb.	9	45%		$3010
	*Thunder in Sun (A. 103)	Colony	10	50%	1st Wk.	—
				35%	After	
		Amb.	3	21%		—

Dist.	Title & Appendix Page	Theatre	Days Playing Time	Percentage Terms	Days for Which % Terms Apply	Guarantee
	*World of Susie Wong (A. 107)	Colony	28	70%	1st Wk.	—
				70%	2nd Wk.	
				50%	After	
			14	43%	2 Wks.	$2500
	The Hangman (A. 104)	Colony	7	40%		$800
		Amb.	4	37½%		—
	*G. I. Blues (A. 107)	Colony	21	70%	1st Wk.	—
				60%	2nd Wk.	
				40%	After	
		Amb.	10	48%		$3325
United Artists	Marty	Colony	7	50%	7	—
	(A. 109)	State	4	40%	4	—
	The Unforgiven (A. 114)	Colony	21	70%	1st Wk.	—
				60%	2nd Wk.	
				40%	3rd Wk.	
		State	11	48%	11	—
	Nightfighters (A. 115)	Colony	7	50%	7	—
		State	4	25%	4	—
Universal	*The Rawhide Years (A. 120)	Colony	10	60%	1st Wk.	—
				40%	After	
		State	4	37½%	4	—
	Mister Cory (A. 123)	Colony	10	50%	10	—
		State	7	40%	7	—
	Joe Butterfly (A. 124)	Colony	14	70%	1st Wk.	—
				50%	After	
		State	10	40%	10	—

Dist.	Title & Appendix Page	Theatre	Days Playing Time	Percentage Terms	Days for Which % Terms Apply	Guarantee
Allied Artists	*The Plunderers (A. 128)	Colony	14	70% 40%	1st Wk. After	—
		Amb.	3	25%	3	—
	*Love in Afternoon (A. 128)	Colony	14	60% 50%	1st Wk. After	—
		Amb.	7	29%	7	—
MGM	*North By Northwest (A. 143)	Colony	21	60% 50% 40%	1st Wk. 2nd Wk. 3rd Wk.	$4000
		State	14	60% 50%	1st Wk. 2nd Wk.	—
	The Gazebo (A. 145)	Colony	21	60% 50% 40%	1st Wk. 2nd Wk. 3rd Wk.	—
		Village	14	50% 37½%	1st Wk. 2nd Wk.	$2750
	*The Last Voyage	Colony	14	60% 50%	1st Wk. 2nd Wk.	—
		Village	7	37½%		$1250

APPENDIX E

TABLE OF LOSSES ON MGM "D" AND "E" PICTURES EXHIBITED AT COLONY THEATRE 1958-1960*

Title	Seago Rating	Charlotte Area Rental	Days Exhibited	Admission Receipts	Film Rental	Overhead at $700 Per Week	Dollars Profit or Loss
7 HILLS OF ROME	D	—	7	$1,576	$ 763	$ 700	$+113
I ACCUSE	E	2.7	4	399	140	400	—241
MERRY ANDREW	D	14.9	14	2,318	1,088	1,400	—170
HANDLE WITH CARE	E	4.6	4	112	39	400	—327
CRY TERROR	E	8.3	7	1,044	261	700	+83
HAUNTED STRANGLER & FIEND WITHOUT FACE	E	6.1	7	649	260	700	—311
ANDY HARDY COMES HOME	E	13.2	6	938	428	600	—90
DUNKIRK	E	8.0	7	1,063	372	700	—9
DECKS RAN RED	E	7.3	8	712	178	800	—266
QUARTER MOON	E	9.2	11	1,286	386	1,100	—200
FIRST MAN IN SPACE	E	11.0	7	767	307	700	—240
WORLD FLESH DEVIL	E	6.2	7	759	190	700	—131
WATUSI	D	38.8	14	2,596	1,500	1,400	—304
MYSTERIANS	D	21.7	8	1,322	397	800	+125
BEAT GENERATION	E	20.0	7	726	182	700	—156
LIBEL	E	5.9	5	389	136	500	—247
PLATINUM HIGH SCHOOL	E	12.1	4	283	142	400	—259
THE SUBTERRANEANS	E	11.5	10	908	436	1,000	—528
KEY WITNESS	E	9.7	7	346	173	700	—527

*FOOTNOTE. This table represents the profit or loss on all MGM pictures rated as "D" or "E" by Petitioner (A. 164-165) from 1958 to 1960, based on deduction of film rental paid and overhead (at $700 per week, A. 186) from gross admission receipts. The admission receipts days' exhibited, and Charlotte area film rental come from respondents tabulations (A. 580-581).

APPENDIX F

TABLE REGARDING PETITIONER'S 153 SUPERIOR BIDS, LISTING THE THEATRES TO WHICH THE PICTURES WERE AWARDED FROM 1953-57 and FROM 1958-60.

Appendix in Plaintiff's 2nd Affidavit	Distributor	1953-57 Amb.	State	Village	Total	1958-60 Amb.	State	Village	Total	Grand Total
A	Fox	8	0	5	13	11	0	1*	12	25
B	Warner	6	1	1	8	1	0	0	1	9
C	Paramount	5	0	2	7	17	0	2	19	26
D	United Artists	1*	13	3*	17	1*	16	0	17	34
E	Universal	0	8	5	13	0	6	3	9	22
F	MGM	0	0	2	2	3	2	10	15	17
G	Allied Artists	0	0	0	0	3	—	—	3	3
H	Columbia	0	2	6	8	0	5	4	9	17
										153

* (One of the pictures was licensed to another theatre in Raleigh controlled by same exhibitor.)

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
EQUITY NO. 87-273

United States of America,
Plaintiff
against
Paramount Pictures Inc., et al.,
Defendants.

CONSENT JUDGMENT AS TO THE PARAMOUNT DEFENDANTS
DATED MARCH 3, 1949

* * * * * *

NOW, THEREFORE, UPON CONSENT OF THE PARTIES HERETO, IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

* * * * * *

III.

A. The defendant Paramount Pictures Inc. (hereinafter in this Section III referred to as "Paramount"), its officers, agents, servants and employees are each hereby enjoined:

* * * * * *

9. From acquiring or continuing to own in conjunction with any actual or potential independent exhibitor any beneficial interest in motion picture theatres. The theatres in which such ownership now exists are the following:

State	City	Name of Theatre
	* * * * * *	
N. CAROLINA (Cont.)	Lexington	Carolina
		Granada
	Lumberton	Carolina
		Pastime
	Monroe	Center
		State
	Mt. Airy	Center
	Raleigh	Ambassador
		Capitol
		Palace
		State
		Varsity

APPENDIX H

Table of Fox and Paramount bids (from Naumkeag v. New England Theatres, Inc. supra).

The following are some pictures of Paramount Film and Fox on which an application of the percentage terms bid by the plaintiff to the actual gross of the Lynn Theatre awarded the picture on first suburban run, produces a greater film rental than was paid by the first-run theatre in Lynn (R).

Title	Paramount Lynn Gross	Lynn Film Rental	Percentage Bid By Plaintiff	Application Plaintiff's Bid To Lynn Gross
Paramount Film				
Rock-A-Bye Baby	$4,415	$1,264	30%-35% SS	$1,475
Vertigo	$5,476	$2,088	25%-50% SS	$2,613
Geisha Boy	$5,570	$1,355	25%-35% SS	$1,647
Don't Give Up The Ship	$6,437	$1,371	25%-35% SS	$2,182
Fox				
Diary of Anne Frank	$4,481	$1,568	25%-50% SS	$1,792
Snow White & 3 Stooges	$3,473	$ 336	25%-50% SS	$1,004
Best of Everything	$4,799	$1,609	25%-50% SS	$1,954

SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

Supreme Court, U.S.
FILED
JAN 26 1968
JOHN F. DAVIS, CLERK

No. 975

JAMES SEAGO,
Petitioner,

—against—

NORTH CAROLINA THEATRES, INC., et al.,
Respondents.

BRIEF FOR THE RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JAMES B. LOVELACE
Attorney for Key Theatres, Inc.
301 First Union National Bank Building
High Point, North Carolina 27260

FRED B. HELMS
Attorney for North Carolina Theatres, Inc. and Wilby-Kincey Service Corporation
800 North Carolina National Bank Building
Charlotte, North Carolina 28202

CHARLES F. YOUNG
Attorney for Paramount Film Distributing Corporation, Metro-Goldwyn-Mayer, Inc., Twentieth Century-Fox Film Corporation, Universal Film Exchanges, Inc., Warner Bros. Pictures Distributing Corporation, United Artists Corporation, Allied Artists Southern Distribution Corporation
200 Park Avenue
New York, New York 10017

January 25, 1968

INDEX

	PAGE
OPINIONS BELOW	1
JURISDICTION	2
THE QUESTION PRESENTED	2
THE STATUTES INVOLVED	3
STATEMENT OF THE CASE	4
ARGUMENT	7
PETITIONER HAS ADVANCED NO REASON WHY THE WRIT SHOULD ISSUE	7
A. Petitioner Did Not Meet the Requirements of Rule 56 of the Federal Rules of Civil Procedure	7
B. Summary Judgment Was the Appropriate Remedy in This Case	12
C. In All the Discovery Proceedings Petitioner Was Not Able to Meet Any of the Requirements Pre-Requisite to a Recovery on an Anti-trust Claim	17
(1) As to Conspiracy	17
(2) As to Proximate Cause	20
(3) As to the Fact and Amount of Damage	21
CONCLUSION	24
Appendix	1a-33a

TABLE OF CASES

PAGE

Bond Distributing Co. v. *Carling Brewing Company*, 32 F. R. D. 409 (D. Md. 1963), *aff'd*, 325 F. 2d 158 (4th Cir. 1963) 12, 13

Cowen v. *New York Stock Exchange*, 371 F. 2d 661 (2nd Cir. 1967) 14

Dressler v. *MV Sandpiper*, 331 F. 2d 130 (2nd Cir. 1964) 14

Gold Fuel Service, Inc. v. *Esso Standard Oil Co.*, 306 F. 2d 61 (3rd Cir. 1962) cert den. 371 U. S. 951 .. 14

Lundeen v. *Cordner*, 354 F. 2d 401 (8th Cir. 1966); 356 F. 2d 169 (8th Cir. 1966) 14, 15, 16

MacLean v. *Parkwood, Inc.*, 354 F. 2d 770 (1st Cir. 1966) 13

Manganaro v. *Delaval Separator Co.*, 309 F. 2d 389 (1st Cir. 1962) 22

Markwell v. *General Tire and Rubber Company*, 367 F. 2d 748, 750 (7th Cir. 1966) 10

Norfolk and Western Ry. Co. v. *Anderson's-Black-Rock, Inc.*, 350 F. 2d 917 (4th Cir. 1965) 13

Rozhon v. *Triangle Publications*, 230 F. 2d 359 (7th Cir. 1956) 22

Savon Gas Stations No. Six, Inc. v. *Shell Oil Company*, 203 F. Supp. 529 (D. Md. 1962), *aff'd*, 309 F. 2d 306 (4th Cir. 1962) 13

Scarboro v. *Universal C. I. T. Credit Corporation*, 364 F. 2d 10, 15 (5th Cir. 1966) 10

Scolnick v. *Lefkowitz*, 329 F. 2d 716 (2nd Cir. 1964) 14

United States v. *Egbert*, 347 F. 2d 987 (5th Cir. 1965) 22

STATUTES

	PAGE
Sections 1 and 2 of the Sherman Act, 26 Stat. 209, Sections 1 and 2 of Title 15, United States Code ..	3
Sections 4 and 16 of the Clayton Act, 38 Stat. 731, 737, Sections 15 and 26 of Title 15, United States Code	2
Section 1254(1) of Title 28, United States Code ...	2
Rule 56 of the Federal Rules of Civil Procedure	8, 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

JAMES SEAGO,
Petitioner,
against
NORTH CAROLINA THEATRES, INC., *et al.*,
Respondents.

No. 975

BRIEF FOR THE RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Opinions Below

The opinion of the Court of Appeals for the Fourth Circuit, in which it affirmed *per curiam* the decision of the District Court, is reported in F. 2d and is printed in the Appendix to this brief at pages 5a-6a. The opinion, findings, conclusions and judgment of the District Court have not been reported but are printed in the Appendix to this brief at pages 7a-33a. Pertinent provisions of the District Court's decision and opinion are, of course, referred to in this brief.

Jurisdiction

The decision affirming the judgment of the District Court, which petitioner seeks to have reviewed by this Court, was entered in the court below on September 25, 1967. The jurisdiction of this Court was invoked under Section 1254(1) of Title 28, United States Code. The jurisdiction of the District Court was invoked under Sections 4 and 16 of the Clayton Act, 38 Stat. 731, 737, Sections 15 and 26 of Title 15, United States Code. Defendants' motions for summary judgment were made under Rule 56 of the Federal Rules of Civil Procedure.

The Question Presented

Petitioner seeks a review and, of course, a reversal by this Court of the decision of the court below which affirmed the judgment of the District Court. In this ordinary action under the anti-trust laws, petitioner has sought to expand his claim out of all proportion to the issues which were before the courts below and which were decided against him. Petitioner makes the extraordinary claim that there were discriminatory practices against him; that there are conflicts among the Circuits and with decisions of this Court; that there were *per se* anti-trust violations; that there were divisions of the market; and that the courts below improperly used Rule 56 to impose unreasonable limitations upon enforcement of the anti-trust laws. Those claims are fictitious. None in fact existed. The questions presented by petitioner, as summariezd above, have no relation to the motions as they were decided by the District Court and affirmed by the court below.

The only question before this Court on this petition is whether there is anything about this case which warrants the attention of this Court. We submit that there is not. The Court below correctly affirmed the decision of the

District Court in entering judgment dismissing the complaint under Rule 56 of the Federal Rules of Civil Procedure because petitioner after complete pre-trial discovery could not demonstrate that he was entitled to subject the respondents to another full trial of his claims. In dismissing the complaint the District Court held (Appendix to this brief, page 31a):

> "Plaintiff has not offered any evidence of a common plan, scheme or design among the alleged conspirators. He has not offered any evidence which would allow him to prove conspiracy by similarity of conduct in that the record does not disclose evidence of a mutual awareness of action or conscious parallelism.
>
> "The plaintiff has presented a very forceful case in his complaint, but he has been unable to support his allegations by evidentiary facts as he must do to resist the motion for summary judgment. Plaintiff has used many of the stock phrases which have been identified with this type of action, but when the Court examines that part of his contentions which remain after disregarding that which is legally insufficient or mere surplusage, it becomes clear that his claim is without substance."

The Statutes Involved

Plaintiff alleged violations of Sections 1 and 2 of the Sherman Act, 26 Stat. 209, Sections 1 and 2 of Title 15, United States Code. The pertinent parts of those statutes are printed in the Appendix to this brief at page 1a.

The motions for summary judgment were made under Rule 56 of the Federal Rules of Civil Procedure. The text of Rule 56 is also included in the Appendix to this brief at pages 1a-4a.

Statement of the Case

Like all lawsuits, this one, commenced in 1961, must some day come to an end. That day is now. Petitioner, like many another owner of a failing or bankrupt business, has sought refuge in the courts to bail out an improvident investment. It is not the purpose or function of this or any other Court to rescue an investor from his own folly. Petitioner has advanced no reason why this Court should review the decision of the District Court as affirmed by the court below. No question is presented which has not been but should be decided by this Court.

This case relates solely to the operation of a small suburban theatre, the Colony, in Raleigh, North Carolina, and to nothing else. In Count 1 of his complaint petitioner set out numerous trade practices in the motion picture industry which he claimed were violations of the anti-trust laws on a nation-wide basis (Pltff's App. pp. 1-17).* in the court below, however, petitioner in his brief abandoned Count 1 of his complaint, declaring that his first count "is not of any great importance here" (Pltff's Brief, p. 3). We agree and thus look to the situation in Raleigh and to the competitive market in which petitioner operated the Colony theatre. Petitioner has advanced no new or compelling reason why the decision below is wrong. All the facts and petitioner's interpretataions of the facts were before the courts below. Indeed, petitioner here is merely repeating the interpretations of the record and the conclusions which he reached with respect to the relative value of certain motions pictures which he claims should have been licensed to him. Petitioner has ignored the fact that he

*It is not clear from the petition to which appendix in the court below petitioner from time to time refers. Petitioner's Appendix in the court below is referred to as "Pltff's App. p. " and respondents' appendix as "Defts' App. p. ".

could not conceivably have exhibited all of the pictures he claims should have been licensed to him. That matter is probably of no moment here. What is of moment here is that all of the arguments now advanced were before the courts below and were decided by them.

When petitioner acquired the Colony it was a 600 seat subsequent run theatre located in a small neighborhood shopping center in Raleigh. Petitioner purchased the theatre from the defendant Consolidated Theatres, Inc., in 1953 for $7,500.* The Colony was not built as a motion picture theatre. It was originally a grocery store which had been converted to a theatre (Defts' App. p. 677a). Consolidated had operated the Colony as a neighborhood second-run theatre. Prior to plaintiff's acquisition of the Colony, the theatre had never been operated as a first-run theatre except upon minor or secondary pictures (Defts' App. p. 678a).

The defendant Key Theatres operates only two theatres anywhere, one being the 1,275 seat State theatre in downtown Raleigh. The other is the Paramount theatre in High Point, North Carolina (Defts' App. p. 10a). Petitioner concedes that his theatre does not have even half the seating capacity of the State. (Petition, p. 21).

Consolidated took over operation of the 650 seat Village theatre in the Cameron Village Shopping Center about the time it disposed of its interest in the Colony. The Cameron Village Shopping Center is one of the largest in North Carolina—or any where else, for that matter—and is located a short distance from North Carolina State University (Defts' App. p. 643a). It is generally known that North Carolina State University in Raleigh has about 12,000 students in residence.

---

*Consolidated Theatres, Inc., and Columbia Pictures Corporation were named as defendants but each settled with petitioner and each was dismissed prior to the decision of the District Court.

The defendant North Carolina Theatres operates only one first-run theatre in Raleigh, the 1,500 seat Ambassador on Fayetteville Street near the state Capitol building. That defendant also operates other theatres in North Carolina, including two subsequent run theatres in Raleigh (Defts' App. p. 807a).

From the day petitioner purchased the Colony in 1953 until he abandoned the theatre in December, 1960, he was afforded an opportunity to and did compete for first-run motion pictures in Raleigh. He was never at any time excluded from the market. There was never a day when the Colony was dark or closed for lack of a picture to show on its screen. Indeed, the petition itself demonstrates that the Colony was licensed many quality pictures even until the last days of petitioner's operation. That petitioner wanted more is of no consequence. No theatre—not even the Radio City Music Hall in New York—gets all the top box office attractions.

When the motions for summary judgment were made petitioner's immediate objection was that he had not had an opportunity for full pre-trial discovery. Defendants agreed that plaintiff was entitled on such a motion to all the discovery necessary, as provided by Rule 56(f) of the Federal Rules of Civil Procedure. The District Court allowed such discovery (Appendix to this brief pp. 9a, 14a). Petitioner then took the depositions of all of defendants' living and available employees and former employees—ten in number—and inspected all the documents he had requested, several thousand altogether. The court below had before it 595 pages of a typed appendix which plaintiff thought essential to his case and a 905 page printed appendix from defendants which, by and large, filled in the omissions made by plaintiff in order to give the court a fair picture of the nature and extent of the evidence produced.

The District Court, of course, had the full record. There is no complaint that petitioner needed more discovery or that any item of discovery was withheld from him or that either court was denied access to pertinent information. Petitioner could not have had more evidence after a full trial.

It would be of no help to this Court, we think, to attempt an extended analysis of petitioner's interpretations of his own affidavits or of his own ratings of the pictures which were not licensed to him, but which he claims should have been licensed to him. We note merely that all of petitioner's speculations, interpretations, conclusions and ratings were before the courts below and were considered by both. All were rejected as being of no probative value. We believe it helpful, however, to point out to this Court the extent and compass of the evidentiary material made available to petitioner and used by him in his arguments below. That is set out above. The only really exceptional aspect about this otherwise ordinary action is the unusual and extraordinary amounts of pre-trial discovery—both oral and written—afforded to petitioner by the District Court and made available to him by the defendants. Nothing was withheld from petitioner and he makes no claim that he needed further and additional discovery. The whole case that petitioner could possibly make was before the courts below.

ARGUMENT

PETITIONER HAS ADVANCED NO REASON WHY THE WRIT SHOULD ISSUE.

A. Petitioner Did Not Meet the Requirements of Rule 56 of the Federal Rules of Civil Procedure.

This Court in 1938, aided by a distinguished committee of scholars, promulgated the Federal Rules of Civil Procedure to govern trial and pre-trial procedures in the federal

courts. As experience in the courts has dictated, there have been from time to time amendments to the rules. One such rule is Rule 56. The most recent amendments, the ones with which we are here concerned, are those to Rules 56(c) and 56(e), which became effective on July 1, 1963.

In formulating and promulgating Rule 56 of the Federal Rules, including the amendments to the rule, there is no suggestion than this Court intended to or did carve out any exceptions to the rule in favor of one type of action over another. Certainly, there is no intimination in any of the Advisory Committee's Notes that Rule 56 was not to have application to actions under the anti-trust laws. Indeed, Rule 56 may, contrary to petitioner's views, have had its greatest value in anti-trust cases. Many worthless cases have been disposed of by summary judgment and others reduced to manageable size. It became fashionable in the 50's and 60's to think of certain anti-trust cases as "prolonged" cases, including cases which in fact have no merit and which not only should not be prolonged but which in fact should be disposed of or curtailed by a judicious application of Rule 56. This is one such case. There is no magic in resorting to Sections 1 and 2 of the Sherman Act to assert a non-meritorious claim.

We come, therefore, to the only question before this Court. Did the court below err in affirming a judgment for respondents under Rule 56? In pertinent part, Rule 56 provides:

> "(c) *Motion and Proceedings Thereon.**** The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that

the moving party is entitled to a judgment as a matter of law.***

* * *

"(e) *Form of Affidavits; Further Testimony; Defense Required.* Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.*** When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

Rule 56 was amended by this Court in 1963 for the express purpose of effectuating the salutary intent of the rule and to dispose of cases such as the case at bar without the necessity for a prolonged trial that could only result in a judgment for the moving parties, here the respondants. That Rule 56 was amended to take care of too rigid standards on motions for summary judgment and to enable the court to dispose of non-meritorious actions is plainly seen in the Advisory Committee's Notes. With respect to the last two sentences in Rule 56(e), which constituted the amendment of 1963, the Committee said, in part, as follows:

"The very mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial.***

> "It is hoped that the amendment will contribute to the more effective utilization of the salutary device of summary judgment."

The Advisory Committee's Notes were given effective force by the courts in *Markwell* v. *General Tire and Rubber Company,* 367 F. 2d 748, 750 (7th Cir. 1966), and *Scarboro* v. *Universal C. I. T. Credit Corporation,* 364 F. 2d 10, 15 (5th Cir. 1966). In each case a summary judgment was affirmed.

The express language of Rule 56(e) required plaintiff in the case at bar to go forward with affidavits or as otherwise provided in the rule. Plaintiff was required to set forth specific facts on his personal knowledge which would be admissible in evidence, showing that the defendants' affidavits were not true, that defendants' employees and former employees had testified falsely on depositions and that there was a genuine issue of fact to be tried. Plaintiff was unable to make such a showing, as the District Court held (Appendix to this brief, p. 31a):

> "Plaintiff has not offered any evidence of a common plan, scheme or design among the alleged conspirators. He has not offered any evidence which would allow him to prove conspiracy by similarity of conduct in that the record does not disclose evidence of a mutual awareness of action or conscious parallelism."

In no place in his brief does petitioner come to grips with the question before this Court. He barely mentions Rule 56 and the specific requirements of Rule 56(e). He has not referred this Court to one single case under Rule 56 which was decided after the effective date of the 1963 amendments. Petitioner has resorted, instead, to the citation of a line of anti-trust decisions which dealt with conspiratorial

action and other similar violations of the anti-trust laws. At no place in his brief or elsewhere has petitioner even claimed that the District Court's findings and conclusions were not supported by the evidence or that the court needed more evidence.

Rather than point to the respects in which the District Court erred, petitioner has resorted to a listing of unrelated anti-trust decisions and has advanced the contention that on the evidence before the court a jury might conceivably have found for petitioner by speculating that the distributor respondents must have had knowledge of the course of conduct of the other distributors with regard to their methods of licensing motion pictures for first-run in Raleigh. We can only say that it would be a most remarkable state of affairs if the managers of the distributors' offices in Charlotte did not know each other and if they had not known generally how pictures were being exhibited in a large city such as Raleigh. Indeed, the distributors subscribed to newspapers in the larger towns for the purpose of knowing which pictures were playing in which theatres (Defts' App. p. 209a). This undisputed fact does not raise petitioner's contention to the level of proof that the respondents had conspiratorial knowledge and had, therefore, conspired to injure petitioner.

There is no dispute that North Carolina Theatres and Consolidated Theatres each operated a number of theatres in towns other than Raleigh. There is not a suggestion in the record, however, that the fact that those exhibitors operated other theatres played any part in the licensing of pictures by them or by the State and Colony theatres. There is no suggestion that Consolidated's Village or North Carolina's Ambassador ever licensed more pictures than could be exhibited. There is no evidence that either defendant ever licensed a

picture for the purpose of keeping petitioner out of the market or that petitioner was ever excluded from the market. The schedules contained in defendants' appendix at pages 888a-901a show that the Village and Ambassador paid substantial film rentals for the pictures exhibited in those theatres. In his affidavit, Mr. Hugh Smart admitted that through error of judgment as to their public appeal he had offered and paid too much film rental on certain pictures (Defts' App. p. 15a). Generalities and unsupported allegations by petitioner will not do in the face of the record which he made in the District Court.

B. Summary Judgment Was the Appropriate Remedy in this Case.

Petitioner has evaded the burden upon him to meet the requirements of Rule 56 on defendants' motions. He has not come forward with specific facts based upon personal knowledge which would be admissable as evidence to defeat the motions. Petitioner's principal argument, seems to be that motions under Rule 56 are not appropriate in anti-trust cases. If that is his theory, petitioner could not be more mistaken.

In the court below, as among the other circuits, there have been many actions under the anti-trust laws which have been disposed of, in whole or in large part, by motions under Rule 56. One such case is *Bond Distributing Co.* v. *Carling Brewing Company,* 32 F. R. D. 409 (D. Md. 1963), *aff'd,* 325 F. 2d 158 (4th Cir. 1963). In that case defendants moved for summary judgment as to the anti-trust allegations contained in the complaint. In granting the motion the District Court said (p. 415):

> "Where there is no genuine issue as to any material fact, it is the duty of the Court to grant a motion for summary judgment in order to save the time and expense which would be required for the preparation

> and trial of the issues covered by the motion. Rule 56, F. R. Civ. P. As Chief Judge Sobeloff said in Zoby v. American Fidelity Company, 4 Cir., 242 F. 2d 76, 80, it is well settled 'that to resist a motion for summary judgment, the party against whom it is sought must present some evidence to indicate that the facts are in dispute, where the moving party's evidence has shown otherwise * * *. His bare contention that the issue is disputable will not suffice.' In the instant case plaintiffs have not been able to present any evidence to indicate that the facts with respect to Count 4 are in dispute, and the moving party's evidence has shown otherwise."

In affirming, the Court of Appeals in its *per curiam* opinion referred to the opinion of the District Court and said (325 F. 2d 158, 159):

> "We further conclude that, since the plaintiffs were unable to point to any evidence tending to support the allegations of Count 4, the Court did not err in determining that there was no genuine issue of any material fact with respect to such allegations and in granting defendant's motion for partial summary judgment."

Savon Gas Stations No. Six, Inc. v. *Shell Oil Company,* 203 F. Supp. 529 (D. Md. 1962), *aff'd,* 309 F. 2d 306 (4th Cir. 1962), is another case where the court below affirmed a judgment for a defendant in an action alleging violations of the anti-trust laws.

That summary judgment is the proper remedy in cases of this sort and other conspiracy cases is also seen in the decisions in *Norfolk and Western Ry. Co.* v. *Anderson's-Black-Rock, Inc.,* 350 F. 2d 917 (4th Cir. 1965), *MacLean*

v. *Parkwood, Inc.*, 354 F. 2d 770 (1st Cir. 1966), *Cowen* v. *New York Stock Exchange*, 371 F. 2d 661 (2nd Cir. 1967), *Gold Fuel Service, Inc.* v. *Esso Standard Oil Co.*, 306 F. 2d 61 (3rd Cir. 1962) cert den 371 U. S. 951, *Dressler* v. *MV Sandpiper*, 331 F. 2d 130 (2nd Cir. 1964), and *Scolnick* v. *Lefkowitz*, 329 F. 2d 716 (2nd Cir. 1964).

A case in point on the overall problem before this Court is *Lundeen* v. *Cordner*, 354 F. 2d 401 (8th Cir. 1966), motion to amend judgment denied, 356 F. 2d 169 (8th Cir. 1966). In that case the parties were concerned with the proceeds of a group insurance policy in which the appellant was the deceased's first wife and the appellee his second wife. Both sought the proceeds of the policy. The District Court entered summary judgment for the second wife (intervener) on the ground that the deceased had changed the beneficiaries of the policy and that no issue of fact existed. In affirming the judgment in favor of the second wife, the Court of Appeals reviewed the evidence and said (354 F. 2d at 407):

> "We are of the opinion that if this information were presented at trial, intervener would be entitled to a directed verdict in her favor, and it has been said that if the information presented entitles one to a directed verdict, a summary judgment is in order. Christianson v. Gaines, 85 U. S. App. D. C. 15, 174 F. 2d 534 (1949); 6 Moore's Federal Practice, § 56.11 [3] (2nd Ed. 1953) at page 2071. Intervener having made a sufficient showing, it then rests upon the plaintiff to specify at least some evidence which could be produced at trial. Belinsky v. Twentieth Restaurant, Inc., 207 F. Supp. 412 (S. D. N. Y. 1962). Plaintiff apparently is of the opinion that, since she makes a prima facie case by merely introducing the Certificate showing her children as

designated beneficiaries, she is entitled to a trial on the issue of (1) whether any change of beneficiary was made, and (2) if so, what changes were actually made. This we do not feel is a correct view of the law.

"The counter-affidavit of the plaintiff does not meet the issues raised and supported by the intervener. This leaves no genuine issue as to any material fact, and presents a predicate for a summary judgment under Rule 56(c), Fed. R. Civ. P."

The court also said (p. 408):

"Therefore, even though cross-examination is a trial right which must be carefully protected, in this case, unlike many others there is no obvious advantage to be gained from a cross-examination. If there were, a summary judgment might arguably be improper. But where there is no indication that the affiant was biased, dishonest, mistaken, unaware or unsure of the facts, the cases declaring that cross-examination is necessary when one of the above is present, have no application here. There being no positive showing that this witness's testimony could be impeached or that he might have additional testimony valuable to plaintiff, summary judgment was properly granted. The opposing party cannot as a matter of course force a trial merely in order to cross-examine such an affiant, nor must the Court deny the motion for summary judgment on the basis of a vague supposition that something might turn up at the trial. Schneider v. McKesson & Robbins, Inc., 254 F. 2d 827 (2 Cir. 1958); Port of Palm Beach District v. Goethals, 104 F. 2d 706 (5 Cir. 1939); 6 Moore's Federal Practice, § 56.15 [3] (2d Ed. 1953) at page 2129.

> "There is absolutely no showing that a trial would produce any different or additional evidence."

And further (p. 409):

> "Keeping in mind that the purpose of the summary judgment is to avoid useless trials, from the circumstances of this case we believe a trial would indeed be a useless waste of time and expense to the parties as well as a needless inconvenience to the Court."

On the motion to amend the judgment, the Court of Appeals in its *per curiam* opinion said (356 F. 2d at 170):

> "In the first place, contrary to the allegations of appellant, we have declared no new law in this area. We have applied the law well established by precedent and Rule 56(e), Fed. R. Civ. P. There is no doubt as to the law. To be entitled to a summary judgment, the moving party must "adequately support" his motion. A motion is "adequately supported" if it demonstrates that there are no genuine issues of fact. Sartor v. Arkansas Natural Gas Corp., 321 U. S. 620, 64 S. Ct. 724, 88 L. Ed. 967 (1944). In affirming the holding of the trial court, we went to great lengths to point out why we believed that the affidavits, the exhibits, and the inferences properly drawn therefrom were, indeed, sufficient to support a motion for summary judgment.
>
> "The law is equally clear that when a moving party presents an adequately supported motion for summary judgment (as was done herein) the adverse party must come forward with facts, not allegations, which controvert the necessary facts set forth in the moving party's case. Rule 56(e) clearly spells out this duty on the sanction of suffering a summary judgment."

C. In All the Discovery Proceedings Petitioner Was Not Able to Meet any of the Requirements Pre-Requisite to a Recovery on an Anti-trust Claim.

Petitioner purported to assert a claim under the anti-trust laws for injury to him in his business of operating the Colony theatre in Raleigh. Ever to succeed on such a claim it was necessary for petitioner to prove that respondents, acting in concert, combined and conspired to injure him in his operation of the Colony, that respondents' acts were the proximate cause of petitioner's alleged injury and that petitioner suffered damages in an ascertainable amount as a result of respondents' acts. To defeat the motions for summary judgment it was incumbent upon petitioner to prove the existence of these essential elements with facts which would be admissible in evidence as required by Rule 56. Petitioner was further required to show affirmatively that he was competent to testify to the matters in issue. Petitioner could not rest upon his theories, speculations and interpretations of the evidence or his conclusions with respect thereto.

The proceedings below were the equivalent of a full trial. There were seventeen affidavits, ten depositions and the production of many thousands of documents. Despite all the discovery afforded to petitioner he was wholly unable to make any showing that any one of these three elements was present. We consider each briefly.

(1) As to a Conspiracy.

Petitioner discovered no evidence whatever of any concert of action or combination among the respondents which had as its aim injury to him. Petitioner's speculations and conjectures that over an eight year period he made superior offers on competitive bidding for 153 pictures—about 20 a year—which were licensed to the other three larger first

run theatres in Raleigh are not supported by the record. The longer playing time and higher percentage terms offered by petitioner on pictures not licensed to him were meaningless in the light of Colony's actual performance on the hundreds of pictures which were licensed to it. The Village, State and Ambassador took in more money at the box office in less playing time (that is, fewer days) and paid higher film rentals than did the Colony. This is true regardless of the quality of pictures exhibited. In Defendants' Appendix in the court below at pages 902a-904a are tables which show the actual performance of the four theatres in Raleigh on Paramount, Metro and Twentieth Century-Fox pictures. The pictures are grouped by total area film receipts in the two Carolinas—the first group being those with total box office receipts of over $100,000, the second from $50 to $99,000 and so on.* In no one of the four groups did Colony exceed the average box office receipts or film rentals paid by the other three theatres. Indeed, petitioner concedes that Colony could not produce equal or superior film rentals to the Ambassador, State and Village theatres on an average daily basis, even on comparable pictures (Petition, p. 14).

Petitioner's conjectures as to superior bids do not raise a jury question because the facts upon which such conjectures are based do not give rise to an inference of conspiracy. The licensing of pictures in Raleigh was a matter of individual business judgment by each distributor.

Petitioner's evaluations of his bids, made in hindsight and in sole reliance upon the factors of longer playing time

*Area film rentals are the entire receipts from all theatres in North Carolina and South Carolina during the exhibition life of a picture. Petitioner himself in the District Court declared that area film rentals constituted the only proper basis of comparison (p. 17 of Petitioner's reply brief in the District Court).

and higher percentages to the complete exclusion of all other relevant factors is pure speculation and, as noted by the District Court, was not worthy of consideration by the court or a jury.

The incongruity of petitioner's position is seen, for example, in his argument that Metro's acceptance of petitioner's bid of longer playing time and higher percentage terms on the picture DON'T GO NEAR THE WATER is proof that Metro acted conspiratorily when it rejected petitioner's bid on other pictures (Petition, p. 39). If, in fact, there had been a conspiracy, why would Metro have licensed DON'T GO NEAR THE WATER to petitioner in the first place? Petitioner in fact was licensed and exhibited many pictures from 1953 to 1960, which he conceded to be of top quality at the box office, including THE TEN COMMANDMENTS, the top picture at the box office of all time in the Carolinas (Defts' App. p. 719a). Many of those pictures are set out in Defendants' Appendix at pages 889a-901a.

Petitioner does not claim that there was an intermittent, part time conspiracy which one day gave him top pictures but the next day excluded him from the market. The licensing of top pictures to the Colony demonstrates that the licensing of pictures was not the result of concert or of any act of conspiracy but the exercise of independent business judgment. The licensing of such top pictures to petitioner is wholly inconsistent with any theory of conspiracy based upon an evaluation of competing bids. The record is wholly barren of any evidence that there was a common plan or design among the respondents in dealing with the petitioner.

The only other suggestion made by petitioner that respondents violated the anti-trust laws is that two of the theatres involved—the State and Ambassador—did not customarily exhibit pictures distributed by the same distributor respondents. Assuming that petitioner is correct in his analysis of the play-offs at the two theatres, he has not pointed

to a shred of evidence from which it could be inferred that the State and Ambassador were able to or did divide the market or that, if there was an attempt to divide, such attempted division deprived him—and Village, too, for that matter—of an opportunity to compete for and obtain pictures or injured him in any other way. Petitioner was never deprived of pictures or of the opportunity to obtain pictures.

Petitioner in fact was awarded and exhibited more of the Paramount and Metro pictures for which he bid than Ambassador, exhibiting thirty-one Paramount pictures to Ambassador's twenty-four and twenty-eight Metro pictures to Ambassador's six (Defts' App. p. 881a).* The only evidence of an attempt to work out a division of pictures was petitioner's efforts at such an arrangement between his Colony and the Village and Ambassador (Defts' App. pp. 648a-49a). State seems not to have been involved in petitioner's efforts.

All these matters were fully considered by the two courts below. Petitioner's claims were rejected by both courts as being without substance.

(2) As to Proximate Cause

The second element necessary to sustain a judgment for injury to property in violation of the anti-trust laws is likewise missing. Since there was no conspiracy, there could have been no acts constituting the proximate cause of any injury to petitioner in his operation of the Colony. Economic factors having nothing whatever to do with the anti-trust violations alleged were the cause of petitioner's eventual lack of success. The Colony was an

*Petitioner was licensed and exhibited Metro, Paramount and Twentieth Century-Fox pictures on 894 of the 1096 days available during 1958, 1959 and 1960 (the maximum damage period—assuming damage). It was physically impossible for petitioner to have exhibited all the pictures he claims should have been licensed to him.

inferior theatre operated on a subsequent run in a small neighborhood shopping center when petitioner acquired it for $7,500 in 1953. If petitioner had some initial success with the theatre, that success rapidly vanished. By 1958 the full impact of television was being felt in Raleigh and Wake County, North Carolina. Fringe theatres, such as the Colony, could not survive that competition. In 1959 there were television sets in 34,400 of the 41,400 households in Raleigh and the rest of Wake County (Pltff's App. p. 595). There were certainly more in December, 1960. In the whole of the South the number of households with television sets increased from 53 per cent. in June, 1955, to 82 per cent. in May, 1960 (Statistical Abstract of the United States, 88th ed.). The total number of theatres in the United States (exclusive of drive-ins) decreased from 14,716 in 1954 to 12,291 in 1958 to 9,150 in 1963. In North Carolina the number of theatres (exclusive of drive-ins) decreased from 373 in 1954 to 346 in 1958 to 218 in 1963 (1954, 1958 and 1963 Census of Business, Selected Services, Motion Pictures, Bureau of the Census).

(3) As to the Fact and Amount of Damage

Evidence of the third element, the fact that petitioner actually suffered damage in an ascertainable amount, is also missing. There is not a word of testimony as to the fact or the amount of damage. There are no schedules showing that petitioner in fact was damaged in his operation of the Colony. There are no opinions, expert or otherwise and whether valid or worthless, as to petitioner's damage, if any, in his operation of the Colony. That petitioner may have had less success than he had hoped is not proof of damages. Nor is the fact that he may even have lost money proof of damages in the anti-trust sense.

When respondents made their motions for summary judgment, petitioner was bound to go forward to show the

existence, contrary to respondents' position, of the foregoing elements necessary to recover on an anti-trust claim. Petitioner failed to make that showing as to any one of the elements and he thus failed to raise any issue for submission to a jury.

A litigant's right to a jury trial, moreover, is by no means absolute. If there is nothing for the jury to decide, the court must direct a verdict at trial or enter summary judgment upon motion. As Circuit Judge Brown said in *United States* v. *Egbert*, 347 F. 2d 987 (5th Cir. 1965), "A useless trial is a luxury none can afford." (p. 988).

In *Manganaro* v. *Delaval Separator Co.*, 309 F. 2d 389 (1st Cir. 1962), the court, in affirming a summary judgment for defendant, said (p. 393):

> "In sum, while we believe that the plaintiff is entitled to all favorable inferences, he is not entitled to build a case on the gossamer threads of whimsy, speculation and conjecture. Such would be necessary were we to overturn the decision of the district court."

The rule on summary judgments and directed verdicts has been stated in many ways. In *Rozhon* v. *Triangle Publications*, 230 F. 2d 359 (7th Cir. 1956), the court said (p. 361):

> "Reviewing the propriety of a directed verdict at the close of a plaintiff's case, as here, it is necessary for us to examine the nature and quantum of the evidence offered and received below. For the right to a trial by jury is not a blanket guarantee that upon this plaintiff producing any potpourri of evidentiary fragments laced, with hints, he is automatically entitled to have his case sent to the triers of fact."

The foregoing principals of law were applied by the District Court in granting defendants' motions for summary judgment (Appendix to this brief, pp. 28a-29a):

> "If the evidence construed most favorably in behalf of the plaintiff would justify or require a directed verdict against him, the Court should enter summary judgment for the defendants. *Dulansky* v. *Iowa-Illinois Gas and Electric Co.*, 10 F. R. D. 566 (S. D. Iowa, 1950), *Dewey* v. *Clark*, 180 F. 2d 766 (D. C. Cir., 1950). A popular formula is that summary judgment should be granted on the same kind of showing as would permit direction of a verdict were the case to be tried. *Sartor* v. *Arkansas Natural Gas Corporation*, 321 U. S. 620, 64 S. Ct. 724 88 L. Ed. 967 (1944). The theory underlying a motion for summary judgment is substantially the same as that underlying a motion for a directed verdict. The essence of both motions is that there is no genuine issue of material fact to be resolved by the trier of facts. In accordance with the theory of a directed verdict, a court should not grant summary judgment where it could not properly direct a verdict although it might properly set aside a verdict as being against the weight of the evidence, and summary judgment should not be granted on the ground that if a verdict were rendered for the adverse party the court would set it aside."

The District Court was correct in its evaluation of the evidence in holding that plaintiff had "presented a very forceful case in his complaint, but he has been unable to support his allegations by evidentiary facts" to resist the motion for summary judgment (Appendix to this brief p. 31a). The complaint was properly dismissed.

CONCLUSION

For all the foregoing reasons it is respectfully submitted that the petition for certiorari should be denied. There is no issue in this case which warrants the attention of this Court. The petition presents no question of law which has not been but should be decided by this Court.

Respectfully submitted,

JAMES B. LOVELACE
Attorney for Key Theatres, Inc.
301 First Union National Bank Building
High Point, North Carolina 27260

FRED B. HELMS
Attorney for North Carolina Theatres, Inc. and Wilby-Kincey Service Corporation
800 North Carolina National Bank Building
Charlotte, North Carolina 28202

CHARLES F. YOUNG
Attorney for Paramount Film Distributing Corporation, Metro-Goldwyn-Mayer, Inc., Twentieth Century-Fox Film Corporation, Universal Film Exchanges, Inc., Warner Bros. Pictures Distributing Corporation, United Artists Corporation, Allied Artists Southern Distribution Corporation
200 Park Avenue
New York, New York 10017

January 25, 1968

Sherman Act Provisions

Section 1 of the Sherman Act, 26 Stat. 209, 15 United States Code, Section 1, in pertinent part, reads as follows:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . ."

Section 2 of the Sherman Act, of 26 Stat. 209, 15 United States Code, Section 2, in pertinent part, reads as follows:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, . . ."

Rule 56 of the Federal Rules of Civil Procedure

(a) *For Claimant.* A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof. As amended Dec. 27, 1946, eff. March 19, 1948.

(b) *For Defending Party.* A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move

with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) *Motion and Proceedings Thereon.* The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages. As amended Dec. 27, 1946, eff. March 19, 1948; Jan. 21, 1963, eff. July 1, 1963.

(d) *Case Not Fully Adjudicated on Motion.* If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) *Form of Affidavits; Further Testimony; Defense Required.* Supporting and opposing adffiavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him. As amended Jan. 21, 1963, eff. July 1, 1963.

(f) *When Affidavits are Unavailable.* Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) *Affidavits Made in Bad Faith.* Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the rea-

sonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 11,298.

James Seago,
Appellant,

versus

North Carolina Theatres, Inc., Wilby-Kincey Service Corporation, Paramount Film Distributing Corporation, Metro-Goldwyn-Mayer, Inc., Twentieth Century-Fox Film Corporation, Universal Film Exchanges, Inc., Warner Bros. Pictures Distributing Corporation, United Artists Corporation, Allied Artists Southern Distribution Corporation, and Key Theatres, Inc.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA, AT RALEIGH.
JOHN D. LARKINS, JR., DISTRICT JUDGE.

(Argued June 23, 1967. Decided September 25, 1967.)

Before SOBELOFF, BOREMAN and BRYAN, Circuit Judges.

W. Bradley Ryan (Guterman, Horvitz & Rubin; Franklin T. Dupree, Jr., and Dupree, Weaver, Horton, Cockman & Alvis on brief) for Appellant, and Fred B. Helms and Charles F. Young (James B. Lovelace and Kenneth C. Royall on brief) for Appellees.

PER CURIAM:

The judgment is affirmed on the District Court's opinion, . . . F. Supp. . . . (E. D. N. C. 1967).

Affirmed.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION
No. 1341—CIVIL

Opinion and Order

JAMES SEAGO,

Plaintiff,

v.

NORTH CAROLINA THEATRES, INC.; WILBY-KINCEY SERVICE CORPORATION; PARAMOUNT FILM DISTRIBUTING CORPORATION; METRO-GOLDWYN-MAYER, INC.; TWENTIETH CENTURY-FOX FILM CORPORATION; UNIVERSAL FILM EXCHANGES, INC.; WARNER BROS. PICTURES DISTRIBUTING CORPORATION; UNITED ARTISTS CORPORATION; ALLIED ARTISTS SOUTHERN DISTRIBUTION CORPORATION; KEY THEATRES, INC.,

Defendants.

LARKINS: *District Judge:*

SUMMARY

This cause comes before the Court as a civil action for treble damages and arises from alleged violations of the Anti-Trust Acts of the United States (The Sherman Act, Title 15 U. S. C. A. Sections 1, 2 and 7; and The Clayton Act, Title 15 U. S. C. A. Sections 12, 15, 16 and 22). Plaintiff alleged, upon filing the complaint on December 29, 1961, that three separate but related violations of the Anti-Trust Acts occurred causing him monetary damages for which he prays recovery. Jurisdiction in the Federal Court

of the matters alleged is provided for in the Anti-Trust Acts and is not in dispute.

The nature of the three alleged violations of the Anti-Trust Acts may be summarized as follows: The first insists that a conspiracy of nationwide significance existed, during the period in suit (from 1953-1960), to monopolize and restrain interstate commerce and trade in the distribution of motion pictures and films for public exhibition; the second is an alleged local conspiracy to monopolize the distribution of motion picture films for exhibition in Raleigh, North Carolina; and the third is an alleged existence of a monopoly in the distribution, licensing and exhibition of films in Raleigh, North Carolina.

Defendants Columbia Pictures, Howco Productions and Consolidated, Inc., have been dismissed from the suit upon agreement of the plaintiff and to his prejudice.

The defendants presently remaining in the case have denied all the alleged violations of the Anti-Trust Acts and have pleaded Title 15 U. S. C. A. Section 15(b) in bar of any recovery for any actions occurring prior to December 29, 1957.

These defendants fall into three categories with some overlapping. The local Raleigh theatres, their owners and managers representing the Ambassador Theatre, the State Theatre, and the Village Theatre, are in the first category. Those in the second category are the distributors of films to the local threatres. The last or third category is composed of parent firms of national standing.

At the first scheduled pre-trial conference of this action, all of the defendants moved for summary judgment of dismissal. In support of their motions, many affidavits and consolidated briefs were filed. Plaintiff replied to the motions and insisted that a proper response thereto could not be accomplished without completing discovery. The Court,

therefore, allowed numerous depositions to be taken and all discovery to be completed. Thereafter, plaintiff James Seago submitted two affidavits for the purpose of opposing defendants' motions. Mr. Seago had previously submitted another affidavit which has been considered in opposition to the motions. Accompanying briefs have also been submitted.

Before the Court at this time for its consideration are the motions for summary judgment of dismissal filed by the remaining defendants.

FINDINGS OF FACTS

The defendant North Carolina Theatres, Inc., is a corporation duly organized by law and has its usual place of business in the City of Raleigh, North Carolina. For many years it has been engaged in the operation of the Ambassador Theatre, the Varsity Theatre and the Tower Drive-In Theatre, all in the City of Raleigh, North Carolina. For several years it has also been engaged in operating some fifty-five or more other theatres and in managing or supervising the operation of a number of other theatres in the State of North Carolina. Hereafter, it will be referred to as "North Carolina Theatres."

The defendant Wilby-Kincey Service Corporation (hereafter referred to as Wilby-Kincey) is a duly organized corporation with its principal place of business in Charlotte, North Carolina. It is engaged in the business of managing and supervising the operation of a large number of theatres in the States of North and South Carolina, including the Ambassador and Varsity Theatres and the Tower Drive-In Theatre in the City of Raleigh.

The former defendant Consolidated Theatres, Inc. (referred to hereafter as Consolidated) is a corporation duly

organized with Raleigh, North Carolina as its principal place of business. For many years it has been engaged in the operation and management of the Village Theatre and the Forest Drive-In Theatre in the City of Raleigh and various other theatres in North and South Carolina. Defendant Consolidated sold the Colony Theatre to plaintiff Seago in 1953. Consolidated has compromised and settled plaintiff's claim against it.

The defendant Key Theatres, Inc. is a corporation duly organized in North Carolina which transacts business in the City of Raleigh. It has been engaged in the operation and management of the State Theatre in the City of Raleigh and one other theatre in the State of North Carolina.

The remaining defendants are all corporations duly organized by law and have their principal places of business in the City and State of New York and transact business in the Eastern District of North Carolina. The defendants Metro-Goldwyn-Mayer, Incorporated (formerly Loew's, Incorporated), Twentieth Century-Fox Film Corporation and the former defendant Columbia Pictures Corporation are now and for some time have been engaged in the business of producing and distributing motion picture films; and the other corporations (except the defendant exhibitors) are now and have been engaged in the business of distributing said films. Hereafter, said corporations will be referred to as the "defendant distributors" and will be designated respectively by the names by which they are generally known in the trade: Paramount, MGM, Fox, Warner, United Artists, Universal, Columbia, Howco (which has been dismissed from the action), and Allied Artists.

For many years the defendant distributors have distributed not only a great majority of the motion picture films produced each year in this country, but also a large portion of the only films having any commercial value.

Plaintiff James Seago was the operator of the Colony Theatre in Raleigh, North Carolina, from 1953-1960, inclusive. In 1953, Seago purchased the equipment and machines then in the Colony Theatre for $7,500.00. After he purchased the theatre, he alleges that he spent an additional $15,000.00 for improvements made to the theatre. At the time he commenced operation, he alleges that he had eighteen years of paid employment in the motion picture business. His former duties consisted of being a projectionist for Wilby-Kincey in Fayetteville, North Carolina, starting in 1942. He states that during this employment he assisted in making the running schedules, newspaper ads, box office reports and inventories. After serving in the armed services, Seago started college but soon thereafter returned to the employment of Wilby-Kincey in Lumberton North Carolina. Plaintiff Seago alleges in his complaint that prior to 1953 the defendants and various other persons and corporations entered into unlawful combination and conspiracy to restrain and to monopolize interstate commerce and trade in motion picture films. He further alleges that the purposes of the combination and conspiracy were to limit and control the distribution and exhibition of motion picture films in interstate commerce; to adopt and to put into effect a nationwide system of structures and runs, clearances and admission prices; (with the exception of United Artists) to adopt and put into effect the practices of block booking and blind buying; by means of franchises, master contracts, formula deals and other methods and means, to grant to controlled theatres privileges and preferences not granted to independent theatres, including the said theatre operated by the plaintiff; and to minimize, suppress and eliminate the competition of independent distributors and exhibitors. Seago alleges in his complaint that pursuant to the combination and conspiracy, the defendants and other persons have engaged in the practices and entered

into the agreements and committed the acts herein alleged. He states that the defendants have maintained a uniform system of runs, clearances and admission prices for motion picture theatres and that the defendant distributors have declined to contract with or to deliver films to the plaintiff except in accordance with the said system. He further states that the clearance was an unreasonable protection. Seago alleges that the defendant distributors have discriminated against the plaintiff in the following particulars:

1. they have granted moveover privileges;
2. they have given special concession in film rentals and special reductions in the license fees charged to the plaintiffs competitors;
3. they have charged the plaintiff excessive license fees;
4. they have failed to deliver films in violation of the contract between the plaintiff and the distributors;
5. they refused to license first-run films to Seago unless he would bid with theatres that were not in substantial competition with him;
6. they conducted competitive bidding between the plaintiff and the defendant exhibitors in such a manner that irrespective of the value of the plaintiff's bids as compared to those of the defendant exhibitors, the plaintiff was unable to secure films for which he had bid;
7. they permitted the defendant exhibitors to exhibit its films without a formal written contract or license agreement and to exhibit films on a "terms later basis".

Plaintiff alleges that the defendant exhibitors have exercised their circuit buying power to induce or coerce the defendant distributors in supplying first-run pictures to the exclusion of the plaintiff. According to Seago, the defendant exhibitors and defendant distributors have ignored the system of competitive bidding, and the defendant exhibitors have paid excessive film rentals in order to keep the plaintiff from getting films. Seago alleges that the above-mentioned acts of the defendants were carried out in an attempt to secure a monopoly in the exhibition of first-run films in the City of Raleigh. Plaintiff further states that the above-mentioned acts of the defendants have been successful in that he became financially embarrassed and was unable to pay his obligations. In the third count of his complaint, Seago alleges that the defendant exhibitor Wilby-Kincey has entered into master agreements with the defendant distributors and has exercised its circuit buying power. Also, in count three, the plaintiff complains that the defendant exhibitors have secured from the defendant distributors the privileges and preferences specified in earlier parts of this opinion.

CONCLUSIONS OF LAW

Defendants have made motions for summary judgment. Plaintiff resisted the motions and claimed that he had not had adequate time in which to finish his discovery, and for that reason the motions were continued until such time as the plaintiff could complete his discovery. Plaintiff, through counsel, has taken numerous depositions of persons involved in the motion picture industry. These depositions run to many hundreds of pages. At the close of all discovery, defendants renewed their motions for summary judgment which are now before the Court. In support of their motions they have filed numerous affidavits which are all basically

the same; that is to say, that there have not been any of the practices as alleged in the plaintiff's complaint. Plaintiff has objected to these affidavits as stating conclusions, as being mere general denials, as attempting to draw fallacious conclusions, and as being insufficient to shift any burden to the plaintiff. The Court agrees in part with the plaintiff in that the affidavits are full of conclusions and general denials, but this does not mean that the defendants' affidavits are to be thrown out and cast aside as these affidavits also state evidential facts as required by Rule 56(e) of the Federal Rules of Civil Procedure. This Court, therefore, holds and decides that these affidavits were in fact sufficient to cause the plaintiff to go forward with affidavit or other means to show evidentiary facts as required by the Federal Rules. Even if the affidavits were not sufficient, this would not prevent the Court from granting summary judgment. Rule 56(e) of the Federal Rules of Civil Procedure permits a motion to be made without supporting affidavits, and Rule 56(c) contemplates that the Court shall consider the "pleadings, depositions, and admissions on file, together with affidavits, if any." *Hoston* v. *J. R. Watkins Company,* 300 F. 2d 869 (9th Cir., 1962). It is also important to note that in the Hoston case, supra, that the ruling was made completely on the plaintiff's depositions which he had taken of the defendant's employees. Defendant's only affidavit in that case was legally insufficient. See also *Pen-Ken Gas and Oil Corp.* v. *Warfield Natural Gas Co.,* 137 F. 2d 871 (6th Cir., 1943), *Jeffress* v. *Weizman,* 221 F. 2d 542 (D. C. Cir., 1955). Besides the affidavits presented by the defendants, there are also the depositions taken by the plaintiff which do not support his claims but in fact support the contentions of the defendants. Plaintiff must, therefore, go forward and produce evidentiary facts which will in fact support the contentions raised in his voluminous complaint and briefs. This has not been done.

The Motions now pending before this Court were filed pursuant to Rule 56 of the Federal Rules of Civil Procedure and more particularly Rules 56(c) and 56(e), which provide as follows:

> "(c) *Motion and Proceedings Thereon*
> The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . ."
>
> "(e) *Form of Affidavits; Further Testimony; Defense Required.*
>
> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appro-

priate, shall be entered against him. As amended Jan. 21, 1963, eff. July 1, 1963."

Defendants have conceded in their brief that prior to the effective date of the amendment that plaintiff in some jurisdictions, such as the Third Circuit, might have raised an issue of fact merely by filing an affidavit saying that defendants' contentions were wrong or even on his pleadings alone, but they claim that this situation no longer prevails. Plaintiff is now required, based upon personal knowledge, to set forth such facts as would be admissible in evidence and show that he is competent to testify with respect to such matters. Rule 56(e) of the Federal Rules of Civil Procedure was amended to take care of a too rigid standard on motions for summary judgment and to enable the Court, after extensive pre-trial discovery proceedings, to dispose of litigation without the necessity for a protracted trial. This is plainly set forth in the Advisory Committee's Notes with respect to the last two sentences in Rule 56(e), which constitute the amendment to that section of the rule in 1963. Those notes read, in part, as follows:

> "The last two sentences are added to overcome a line of cases, chiefly in the Third Circuit, which has impaired the utility of the summary judgment device. A typical case is as follows: A party supports his motion for summary judgment by affidavits or other evidentiary matter sufficient to show that there is no genuine issue as to a material fact. The adverse party, in opposing the motion, does not produce any evidentiary matter, or produces some but not enough to establish that there is a genuine issue for trial. Instead, the adverse party rests on averments of his pleadings which on their face present an issue. In this situation the Third Circuit cases have taken the

view that summary judgment must be denied, at least if the averments are 'well pleaded,' and not suppositions, conclusory, or ultimate." (citations omitted)

"The very mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial. The Third Circuit doctrine, which permits the pleadings themselves to stand in the way of granting an otherwise justified summary judgment, is incompatible with the basic purposes of the rule. See 6 Moore's Federal Practice 2069 (2 ed. 1953); 3 Barron and Hotlzoff, supra, Sec. 1235.

"It is hoped that the amendment will contribute to the more effective utilization of the salutary device of summary judgment."

In *Waldron* v. *British Petroleum Co.*, 38 F. R. D. 170 (S. D. N. Y. 1965), a private anti-trust case, the defendant Cities Service Co. initially made a motion for summary judgment in 1960 under Rule 56(e) of the Federal Rules of Civil Procedure on the ground that plaintiff had failed, in his affidavits, to set forth specific facts showing that there was a genuine issue for trial. This motion was adjourned for the purpose of enabling plaintiff to conduct limited pre-trial discovery. The Court said at that time "(t)he naming of Cities Service Co. as a defendant herein when the complaint was drawn was based only on suspicion and on a gossamer inference drawn from the mere sequence of events." The Court in the Waldron case went further and said that "the single issue before the court relating to Cities' motion for summary judgment is whether plaintiff's discovery has unearthed a 'genuine issue (of fact) for trial' where nothing had existed before but suspicion and gossamer inference drawn from the mere sequence of events."

> "The crucial facts which plaintiff must produce in order to survive Cities motion for summary judgment are evidentiary data tending to prove that Cities became a party to the alleged conspiracy. These evidentiary data have not been forthcoming. Even the 'gossamer inference' that existed in 1961 has become attenuated into nothingness as a result of the pre-trial record developed during the last four years."

The Court concluded by saying:

> "The case against Cities has gone far enough. More than five years have elapsed since Cities first made this motion for summary judgment. Plaintiff has had ample time and opportunity to discover and present concrete particulars demonstrating that there is a genuine issue for trial. At this late day plaintiff still cannot point to specific facts or evidentiary data."

Judge Herlands in the Waldron case, supra, relief on *Dressler* v. *MV Sandpiper,* 331 F. 2d 130 (2nd Cir., 1964), and *Scolnick* v. *Lefkowitz,* 329 F. 2d 716 (2nd Cir., 1964). In the Scolnick case, plaintiffs alleged a conspiracy to violate their civil rights and their constitutional rights by placing them in a mental institution. The district court granted summary judgment as to the alleged conspiracy to violate the statute. The Court said:

> "(W)hile plaintiffs vaguely assert that the defendants departed from the scope of their official duties in a conspiracy to incarcerate them illegally in a mental institution, Judge Murphy's award of summary judgment as to this allegation was clearly proper. Defendants' detailed affidavits, categorically

> denying the existence of such a conspiracy—and, in the case of Lefkowitz, denying knowledge of the plaintiffs' very existence—were sufficient to require the plaintiffs to 'set forth specific facts showing that there is a genuine issue for trial' under the recent amendment to rule 56(e)."

In *Dressler* v. *MV Sandpiper,* 331 F. 2d 130 at 133 (2nd Cir., 1964), the Court said "(T)he highly general assertions of Fanale's answer to the libel, buttressed by no specific facts or evidentiary data, are hardly the sort of concrete particulars which the amendment sought to require." Although this case dealt with Rule 58 of the Admiralty rules, the Court in the above-quoted passage was referring to Rule 56 of the Federal Rules of Civil Procedure, which the Court called a carbon copy. It is important to note that the sufficiency of the allegations of a complaint do not determine the motion for summary judgment, for if this were the case, Rule 56 would be a nullity for it would merely duplicate the motion to dismiss. *Lindsey* v. *Leavy,* 149 F. 2d 899 (9th Cir., 1945).

It now becomes necessary to decide if the plaintiff by his own affidavits and the depositions of the defendants' employees, both former and present, has raised any issue of material fact which would defeat the motions for summary judgment. Plaintiff's first affidavit states that it was the purpose of the plaintiff to run the Colony Theatre as a "first-run theatre," and that the Colony was qualified to be a first-run theatre. Plaintiff's second affidavit states that it is his opinion, based on his experience, that he had made superior bids on a large number of pictures which were awarded to defendant exhibitors. In his third affidavit, he states his qualifications to rate the pictures as to his superior bids and goes on to classify various pictures upon which he had bid. Plaintiff has mentioned the alleged

preferences or concessions which he so strongly insists happened in his complaint, but he has not alleged facts which would support these allegations.

Plaintiff cites as additional evidence of a conspiracy the denial of the right to bid for certain periods of time. Taking the depositions as true, which recite that competitive bidding was discontinued for periods of time during the time in which Seago ran the Colony Theatre, this does not in itself establish that there was in fact a conspiracy, nor is it evidence of a conspiracy. Plaintiff does not introduce facts which would show that the bidding was discontinued because of any common plan or design.

In *Brown* v. *Western Massachusetts Theatre, Inc.*, 288 F. 2d 302 at 304 (1st Cir., 1961), the Court said:

> ". . . We have no doubt, however, that a jury could have concluded that competitive bidding by the particular distributors in question was not always what it purported to be, or concluded that, in the instances shown, plaintiff's bids were not considered on an equal footing with defendant's. But the real issue is what legal significance could be attributed to such a finding. To determine this the status of competitive bidding in the motion-picture industry is a necessary background. In United States v. Paramount Pictures, Inc., 1948, 334 U. S. 131, 161-166, 68 S. Ct. 915, the court set aside that part of the district court's decree which required first-run films to be distributed among exhibitors according to a competitive-bidding system. To a large extent the court's holding in this respect was based on its belief that it would often be impossible to evaluate the bids, and equally difficult to determine when a distributor's preference of one exhibitor over another, for reasons not appearing on the face of a

> bid, was an exercise of valid business judgment and not the result of illegal favoritism. Id., 334 U. S. at page 163, 68 S. Ct. at page 932. Of course this is not to question that competitive bidding is one acceptable method of distributing films for exhibition. But cf. id. 334 U. S. at pages 164-165, 68 S. Ct. at pages 932-933. It does indicate, however, why a departure from competitive bidding does not in itself constitute or prove a violation, and cannot be helpful to the plaintiff unless he can rationally relate it to other conduct by the alleged conspirators."

Plaintiff has inserted the idea that the lack of competitive bidding at all times is in fact evidence of a conspiracy. This Court disagrees. Producers and distributors of motion picture films are not required to license their products to every exhibitor who desires or requests them. "An exhibitor does not have the absolute right to compel producers and distributors to furnish him films or to give him the privilege of exhibiting them on the basis of any specified run." *Loew's Inc.* v. *Cinema Amusements, Inc.*, 210 F. 2d 86 at 92 (10th Cir., 1954), certiorari denied in 347 U. S. 976. Plaintiff, through counsel, admits in his brief that the defendant Universal discontinued bidding in May 1959. Plaintiff claims that it is a question for the jury as to whether or not Universal discontinued bidding because Seago owed them money or because this was a part of the conspiracy against him. Plaintiff alleges by brief that defendant Allied Artists, despite written requests for competitive bidding by the plaintiff in 1954, 1955 and 1957, did not allow the plaintiff the right to bid for first-run films in Raleigh until about August 30, 1960. As previously mentioned, defendant Universal discontinued bidding in May 1959 through the closing of plaintiff's theatre in December 1960.

The plaintiff alleges that he was deprived of the right to bid for Fox pictures first-run in Raleigh on October 3, 1960. The plaintiff further alleges that the defendant distributor Warner did not allow plaintiff the right to bid for first-run films in Raleigh until December 21, 1954, almost 18 months after plaintiff opened his theatre. Competitive bidding was in effect from December 21, 1954 until April 23, 1958 with defendant Warner, when it was discontinued as to the plaintiff Seago. Defendant Warner alleges that it was discontinued because of the failure of the plaintiff to bid on fourteen pictures. Plaintiff alleges that he was allowed to bid again after February 4, 1959, after writing a letter to the Attorney General's office complaining about not being allowed to bid. Taken as true, plaintiff only establishes that he was not allowed to bid on pictures at different times during the period from 1953 to 1960, inclusive. This does not establish conspiracy or even evidence of a conspiracy standing alone. Plaintiff admits that when competitive bidding was not in effect the pictures were licensed by negotiation, although he does claim that he was not allowed to negotiate for films. Even though competitive bidding was in effect for a majority of the time during the period from 1953 through 1960, it was discontinued at different times by different distributors. Plaintiff has not produced any evidence which would show that the discontinuance of bidding by the different distributors was anything other than the independent and uninfluenced choice of each distributor, and there is nothing illegal about the discontinuance of competitive bidding so long as it is not the result of a common plan to monopolize the trade or industry or otherwise violate the anti-trust laws.

Plaintiff further alleges that there is evidence of the circuit buying power of the defendant exhibitors Wilby-Kincey, North Carolina Theatres, and Consolidated Theatres.

Plaintiff alleges that this fact is established by the depositions of the representatives of Consolidated and Wilby-Kincey, and the representatives of MGM, Universal, Paramount, Warner and the former defendant Columbia. In substance, the depositions indicated, according to the plaintiff's allegation, that a representative of the particular defendant distributor would go to the office of the defendant exhibitor and attempt to license whatever pictures were available to substantially the theatres where the distributor regularly sold his product, if possible; and that frequently, as a result of a particular day's negotiations, a deal would be made to license a picture of that defendant distributor for exhibition at a large number of the theatres of the defendant exhibitor. John W. Kirby testified in his affidavit that he would attempt to sell as many pictures as he could, theatre by theatre, town by town, with the particular organization. The testimony revealed in the other depositions was to the same effect. Plaintiff attempts to claim that this is evidence of circuit buying, but again this Court does not agree. One would not expect the distributors' representative to attempt to license just one picture at each trip to the buyer's office. He would not be expected to license one picture, leave the office, walk around the block and then come back into the office and license another picture. The mere fact that the distributors and the exhibitor or his buying agent licensed more than one picture for more than one town at one sitting is not per se conspiracy or even evidence of a conspiracy. Again, there does not appear to be any evidence of a common plan, scheme or common design, but just the fact that the operations were carried out in the most economical way possible. Block buying, as the plaintiff insists, is illegal per se, but this does not mean to say that films may not be licensed more than one at a time. Block buying becomes illegal only when there is a requirement that the individual buyer purchase or license one film in order

that he be able to license another, but films may be sold in blocks or groups where there is no requirement, express or implied, for purchase of more than one film. *Krinsley* v. *United Artists Corp.*, 119 F. Supp 665 (N. D. Ill. 1954), *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131 (1948).

Plaintiff also alleges as evidence of a conspiracy that there was a substantially uniform structure of runs and clearances in effect in Raleigh on the products of the defendant distributors and the defendant exhibitors. Plaintiff, in his brief, through counsel, states:

> "It should be noted that the statements in paragraph 3 that there were no move-over runs, franchises, master agreements, master contracts, or blanket deals, or formular deals is also, of course, factual. However, those particular practices are only background to the present conspiracy, and have not been been relied upon by plaintiff with regard to the conspiracy charged. . . . The plaintiff has no knowledge of the existence of particular practices such as blind buying, block booking, or franchises any place in the country after 1950, because those particular practices were eliminated after the Paramount case."

Plaintiff's Reply Brief in Opposition to Motion of Defunct Defendant for Summary Judgment, Page 9, Transcript of Motion Hearing, p. 66.

Plaintiff claims that the uniform structure of runs is to be considered as evidence of a conspiracy along with his previous contentions. In his third affidavit he says that there is a substantially uniform system ranging from a minimum of 30 days clearance to a maximum of 45 days, depending on the particular distributor. In his brief he says that the defendant Paramount had in effect a 42-day

clearance during the period 1954-1957, which was subsequently changed to 35 days; the former defendant Columbia had a 45-day clearance in the 1959-1960 season. The defendant Fox had a 35-day clearance in 1956, and it was still in effect in 1960. The defendant Warner had in effect a 30-day clearance in 1957. Plaintiff also attempts to make a point of the desire of Wilby-Kincey and North Carolina Theatres to have as long a clearance as possible on the pictures exhibited first-run at the Ambassador, as illustrated by the statements of Roy Smart; that a 35-day clearance was barely reasonable; and that he would like to have had more clearance. There is nothing illegal per se about a clearance so long as it is reasonable. In all the depositions taken by the plaintiff the testimony was to the effect that the clearances, which in fact did exist, were reasonable. Plaintiff cannot establish a conspiracy by the fact that clearances were in effect in the Raleigh area. He must show that they were in fact unreasonable, and that they were in fact used pursuant to a common plan or design to discriminate against the plaintiff. *Orbo Theatre Corporation* v. *Loew's, Incorporated,* 156 F. Supp. 770 (D.C. D.C. 1957), affirmed in 261 F. 2d 380 (D.C. Cir., 1958), certiorari denied in 359 U. S. 943 (1959), *Robbinsdale Amuse. Corp.* v. *Warner Bros. Pic. Dist. Corp.,* 141 F. Supp. 134 (4th Div. Minn. 1955).

Plaintiff also claims that the fact there was a split product between the Ambassador Theatre and the State Theatre is evidence of a conspiracy. This alleged agreement was to the effect that the Ambassador would bid for the product of certain distributors and the State would not bid against them for this product. The State Theatre, in like effect, was to have the right of bidding for the product of certain distributors, with the Ambassador submitting bids against them. The agreement or the fact of common knowledge of the practice was denied in the depositions

which were taken of the representatives of the organzations involved; however, taking the case in the light most favorable to the plaintiff as the Court is required to do on a motion for summary judgment, there is evidence from which it could be inferred that in fact there was a split product. For this reason, it becomes necessary to decide what effect, if any, a split product would have as being or not being evidence of a conspiracy. Plaintiff claims that the agreement, if in fact there was an agreement, had its effect to limit competition among the motion picture exhibitors. Assuming arguendo, that this is true, it would not have damaged plaintiff since the effect would have been that the plaintiff would have had to bid only against the Ambassador or the State depending upon which distributor he was dealing with. It would have in effect made it easier for the plaintiff to obtain pictures since he would not have had to bid against as many exhibitors as he would have, had there be no split product. There is not any evidence that the effect of this split of product, if in fact there was a split, was to foreclose the plaintiff from being allowed to license films or to compete in the bidding and negotiation for the films. *In Viking Theatre Corporation* v. *Paramount Film Distributing Corp.*, 320 F. 2d 285 at 292, 293 (3rd Cir., 1963), the Court said:

> "The plaintiff argues preliminarily that a split system, which, as here, does not include all exhibitors in the competitive area, constitutes a per se violation of the antitrust laws. It is not argued that all split systems are illegal; the substance of the plaintiff's argument is that those which do not include all exhibitors are per se illegal. We do not agree. We have heretofore noted that each exhibitor was at all times afforded the opportunity to license the pictures of each distributor notwith-

standing the split. There is no evidence that any exhibitor requesting participation in the split of product would have been excluded.

". . . There is no evidence in this case that the split system, standing alone, had this effect, or was so intended. Therefore, we decline to hold the split system to be per se illegal, and we do not consider the system, standing alone, as evidence of a conspiracy to violate the antitrust laws."

The anti-trust laws do not require that a business cut its own throat.

The Viking case, supra, is very similar to the case at hand. It was an anti-trust action by the owner and operator of a motion picture theatre against the distributors and exhibitors of motion pictures. The District Court held for the defendant saying that the evidence failed to present a jury question as to whether the defendants were guilty of discriminatory conduct from which it could be inferred that a conspiracy existed. The evidence was declared legally insufficient and the Court directed a verdict for the defendants. Plaintiff had claimed that there was a routine rejection of his superior bids or offers and that this was evidence of a conspiracy. He claimed that he was required to offer excessive rentals as a prerequisite to being licensed films. He alleged that there was an adjustment of film rentals and playing time in favor of the defendants and the denial of similar adjustments, and that he was required to make extensive commitments as to playing time in order to license films. Plaintiff in this case alleges, as did the plaintiff in the Viking Theatre case, supra, that he submitted superior bids on pictures which were subsequently licensed to defendant exhibitors. His claim rests upon the offer of longer playing time and a higher percentage of his gross receipts. He urges that it may be inferred from this fact

that the distributors rejected his bids and offers with intent to injure him pursuant to a common scheme. The Court in the Viking Theatre case answering at page 295 these same contentions said:

> ". . . In our opinion, the comparisons failed to support the inference urged.
>
> "The technique employed to arrive at the comparisons can be afforded but little legal significance. . . . The admission that plaintiff required substantially more playing time to achieve comparable grosses is not unimportant in an evaluation of the financial terms of competing bids. . . . We note further that the comparison technique generally ignores such terms as the availability date and the length of playing time.
>
> "Another defect inherent in the comparison technique is its reliance upon a hindsight determination of the grossing power of films. . . .
>
> ". . . Plaintiff's claim of superiority, therefore, rests on pure conjecture."

In the Brown case, supra, 288 F. 2d 302 at 305, the Court said in footnote 7:

> "Plaintiff constantly refers to the fact that it is theoretically possible for a small house to gross more than a large one on a given film by having a longer run. His argument, in addition to not having been testimonially connected to Greenfield, overlooks the fact that long runs delay the use of the print elsewhere."

If the evidence construed most favorably in behalf of the plaintiff would justify or require a directed verdict against him, the Court should enter summary judgment

for the defendants. *Dulansky* v. *Iowa-Illinois Gas and Electric Co.,* 10 F.R.D. 566 (S.D. Iowa, 1950). *Dewey* v. *Clark,* 180 F. 2d 766 (D.C. Cir., 1950). A popular formula is that summary judgment should be granted on the same kind of showing as would permit direction of a verdict were the case to be tried. *Sartor* v. *Arkansas Natural Gas Corporation,* 321 U.S. 620, 64 S. Ct. 724 38 L. Ed. 967 (1944). The theory underlying a motion for summary judgment is substantially the same as that underlying a motion for a directed verdict. The essence of both motions is that there is no genuine issue of material fact to be resolved by the trier of facts. In accordance with the theory of a directed verdict, a court should not grant summary judgment where it could not properly direct a verdict although it might properly set aside a verdict as being against the weight of the evidence, and summary judgment should not be granted on the ground that if a verdict were rendered for the adverse party the court would set it aside. *Fuqus* v. *Deapo,* 34 F. R. D. 111 (W. D. Ark., 1964). It is important to note, however, that facts sufficient to preclude granting of summary judgment cannot be based on sheer speculation rather than the drawing of logical inferences. *Fiumara* v. *Texaco, Inc.,* 204 F. Supp. 544 (E. D. Pa., 1962), affirmed in 310 F. 2d 737 (1962). As the Court said in the Viking Theatre case, supra, 320 F. 2d 285 at 296:

> "Because of the unsubstantial nature of the comparison technique employed and the equivocal results obtained by the application of that technique, we are of the opinion that it would be impermissible to allow a jury to draw the inference that the rejection of the plaintiff's bids resulted from an intent to discriminate. A jury is permitted to draw only those inferences of which the evidence is reasonably sus-

ceptible, and may not be permitted to resort to speculation. Therefore, we hold that the evidence was insufficient to support the claim that the distributors rejected superior bids of the plaintiff in furtherance of a common plan."

A mere scintilla of evidence is not enough to create an issue; there must be evidence on which a jury might rely. *McVay* v. *American Radiator & Standard S. Corporation,* 1 F.R.D. 677 (D.C. Pa., 1941), affirmed 119 F. 2d 593 (1941). A party may not escape summary judgment on the mere hope that something will turn up at the trial.

Plaintiff has failed to raise a genuine issue of material fact in opposition to the motions for summary judgment by the defendants. He had not alleged evidentiary facts in his affidavits and the plaintiff's depositions do not raise the necessary issue of fact to resist the motion. He has attempted to raise an issue of genuine fact by his theory that he has submitted superior bids for the motion pictures, but this is without legal force and amounts only to speculation or conjecture, and he would not be allowed to go to the jury based upon such contentions. Plaintiff has attempted to raise other issues of material fact in his allegations as to runs and clearances, split of product, circuit buying or block booking, but his evidence has not established any illegality or even evidence of a conspiracy by the facts as appear from this record, taking them in the light most favorable to the plaintiff.

Plaintiff has alleged many things which when taken with some other factors, which are lacking here, could be considered evidence of a conspiracy. He alleged runs and clearances are evidence of a conspiracy, but he has not alleged facts which would show that the runs and clearances were unreasonable. He has alleged a split of product, but he offers no proof to show that the Colony Theatre was fore-

closed from entering into negotiations or the competitive bidding because of any split of product. He has alleged that there was evidence of circuit buying, but he does not show any proof that the licensing of one film was contingent upon the licensing of other films. Plaintiff's evidence does not show the required plus factor and, therefore, he has not raised a genuine issue of material fact.

Plaintiff has not offered any evidence of a common plan, scheme or design among the alleged conspirators. He has not offered any evidence which would allow him to prove conspiracy by similarity of conduct in that the record does not disclose evidence of a mutual awareness of action or conscious parallelism.

The plaintiff has presented a very forceful case in his complaint, but he has been unable to support his allegations by evidentiary facts as he must do to resist the motion for summary judgment. Plaintiff has used many of the stock phrases which have been identified with this type of action, but when the Court examines that part of his contentions which remain after disregarding that which is legally insufficient or mere surplusage, it becomes clear that his claim is without substance.

ORDER

Therefore, it is ORDERED AND ADJUDGED that the motions for summary judgment be and the same are allowed.

Enter: December 29, 1966.

/s/ JOHN D. LARKINS, JR.
John D. Larkins, Jr.
United States District Judge

Judgment

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION
No. 1341—CIVIL

JAMES SEAGO,

Plaintiff,

v.

NORTH CAROLINA THEATRES, INC.; WILBY-KINCEY SERVICE CORPORATION; PARAMOUNT FILM DISTRIBUTING CORPORATION; METRO-GOLDWYN-MAYER, INC.; TWENTIETH CENTURY-FOX FILM CORPORATION; UNIVERSAL FILM EXCHANGES, INC.; WARNER BROS. PICTURES DISTRIBUTING CORPORATION; UNITED ARTISTS CORPORATION; ALLIED ARTISTS SOUTHERN DISTRIBUTION CORPORATION; KEY THEATRES, INC.,

Defendants.

LARKINS: *District Judge:*

Upon the motions of the defendants for summary judgment, it appearing to the Court that there is not a genuine issue of a material fact for trial the Court after due deliberation now renders its decision and has made and filed its findings of fact, conclusions of law and order for judgment granting the motions for summary judgment.

It is, therefore, ORDERED, ADJUDGED and DECREED that the plaintiff take nothing by this action and the action is dismissed.

Entered this the 29th day of December, 1966.

/s/ JOHN D. LARKINS, JR.
John D. Larkins, Jr.
United States District Judge

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAR 1 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1967

No. 975

JAMES SEAGO,

Petitioner,

- against -

NORTH CAROLINA THEATRES, INC., et al,

Respondents.

PETITIONER'S REPLY TO BRIEF OF RESPONDENTS IN OPPOSITION TO CERTIORARI

MILTON BORDWIN
W. BRADLEY RYAN
Counsel for Petitioner
50 Congress Street
Boston, Massachusetts.

COMMERCIAL PRINTING COMPANY, RALEIGH, N. C.

INDEX

	PAGE
IN GENERAL	1
THE AUTHORITIES CITED BY RESPONDENTS ARE INAPPLICABLE TO THE ISSUE	3
RESPONDENTS IGNORE THE FACTS IN THE RECORD	4
Evidence as to a Conspiracy	5
Respondents' Arguments Regarding Impact of Television Are Without Basis	8
The Evidence of Damage Was Sufficient	9
REASONS FOR GRANTING THE WRIT	12

CITATIONS

Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 266	9
Bordonaro Bros. Theatres, Inc. v. Paramount Pictures, Inc., (2nd Cir.) 176 F. 2d 594, 597	11
Continental Ore Co. v. Union Carbide and Carbon Corp. 370 U.S. 690	4
Paramount Film Distributing Corp. v. Village Theatre, Inc., 228 F. 2d 721 (10th Cir. 1955)	7
Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464	4
Rankin v. Associated Billposters, (2nd Cir.) 42 F. 2d 152	12

PAGE

Sablosky v. Paramount Film Distributing Corporation, (E.D. Pa.) 134 F. Supp. 929, 936 ---------- 11

Sheldon v. Metro-Goldwyn Pictures Corp., 309 U.S. 390, 406-408 ---------- 12

Twentieth Century-Fox Film Corp. v. Brookside Theatre Corp., (8th Cir.) 194 F. 2d 846, 855-56 11

United States v. Paramount Pictures, Inc., 334 U.S. 131, 166-67 ---------- 9

Viking Theatre Corp. v. Paramount Film Distributing Corp., 320 F. 2d 285 (3rd Cir. 1963, aff'd 378 U.S. 123) ---------- 13

STATUTES

Rule 56 of the Federal Rules of Civil Procedure ------ 3

IN THE

Supreme Court of the United States

October Term, 1967

No. 975

JAMES SEAGO,

Petitioner,

- against -

NORTH CAROLINA THEATRES, INC., et al,

Respondents.

PETITIONER'S REPLY TO BRIEF OF RESPONDENTS IN OPPOSITION TO CERTIORARI

A. IN GENERAL

An examination of the brief of the respondents discloses that it fails to meet squarely most of the facts and all of the law set out in the petition. In addition, it has failed to rebut, or in most instances even discuss, the reasons set out in the petition why it is important that this Court exercise its supervisory power here. In purporting to discuss the evidence of conspiracy, it refers to only a few selected facts from the record. For these reasons it appear useful in this brief not only to discuss the arguments made by respondents, but to call attention to the facts and law in the petition which they completely ignore or avoid.

Preliminarily, it should be noted that there are implications in respondents' brief that because petitioner's initial investment in the Colony Theatre was only $7,500, and because Colony had not been operated as a first-run theatre by Con-

solidated, that it was not satisfactory for first-run operation [RB, pages 5, 21][*1]; The record squarely contradicts any such implication. Respondents' assertion that petitioner purchased the Colony from the defendant Consolidated for $7,500 is flatly wrong [RB, page 5]. Petitioner purchased only the theatre equipment from Consolidated for the $7,500, and operated the theatre on a lease from the landlord. The owner of the building leased the theatre to petitioner, because he was dissatisfied with Consolidated's operation of the theatre [A, page 160]. Naturally Consolidated had not operated Colony on a regular first-run policy, because it operated the first-run Village Theatre in Raleigh and would only have been competing against itself [A, pages 159-160; Pet., pages 5-6].

In the first three years of operation stereophonic sound, 3-D, a new screen were installed, and most of the booth equipment was replaced. The theatre was repainted inside and out, the seats were reupholstered and many other improvements and renovations made [A, 160-161]. All the evidence in the record indicates that the Colony Theatre was comfortable and completely satisfactory for operation as a first-run theatre. This is also generally admitted by representatives of respondent-distributors who had been inside the theatre [A, 160-161, Deft's. App. 399a-401a]. Nor was the seating capacity of the Colony a drawback since its 600 seats were only 50 seats less than the first-run Village Theatre of Consolidated [DB, page 5]. Actual exhibition results at the Colony further demonstrated its suitability for first-run [Pet., pages 14-19]. For example, in 1954 Colony produced a film rental of $12,342 on a gross of $17,161 on Paramount's WHITE CHRISTMAS, and this is the largest film rental paid to any distributor by any first-run theatre in Raleigh set out in the record. When Colony could get the good pictures, it produced excellent results. (A. 158-159, 185-186; Pet. 14-19).

1*In this brief, as in the petition, petitioner refers to his Appendix in the court below as "A". Respondents' brief is referred to as "RB, page ," and the petition is referred to as "Pet., page

Respondent's bland assertion that petitioner was never excluded from the market is plainly contradicted in the record.

It is undisputed that 5 of the respondent-distributors refused to even let petitioner bid at all during certain periods, and that none of them were allowing him to bid at the time he was forced out of business [Pet., pages 8, 26]. Of course, the rejection of petitioner's 153 superior bids, during periods that bidding was conducted, also constituted exclusion of petitioner from the market for the desirable first-run pictures [Pet., pages 9-19].

B. THE AUTHORITIES CITED BY RESPONDENTS ARE INAPPLICABLE TO THE ISSUE.

Respondents make much in their brief over the amendments to Rule 56(c) and (e), stressing that petitioner has not cited cases under Rule 56 decided after the 1963 amendments [RB, pages 7-12]. Respondents' contentions are without merit, since it is clear that the primary purpose of the amendment to Rule 56 (e) was to avoid "[T]he Third Circuit doctrine, which permits the pleadings themselves to stand in the way of granting an otherwise justified summary judgment . . . " and it was not " . . . designed to affect the ordinary standards applicable to the summary judgment motion." [See Advisory Committee Notes]. It is clear, therefore, that the amendments have not in any way changed the applicability of decisions of this Court relating to summary procedures cited by petitioner.

Respondents have criticized petitioner for citing "a line of anti-trust decisions which deal with conspiratorial action and other similar violations of the anti-trust laws" [RB, pages 10-11]. However, petitioner attempted to cite antitrust decisions with fact situations as closely analogous as possible to the instant case to demonstrate that evidence of the nature contained in the record in the courts below clearly warranted an inference of conspiracy, and thus presented a genuine issue of material fact for trial.

Respondents, on the contrary, under the heading "Summary Judgment Was The Appropriate Remedy In This Case" has cited cases which are completely irrelevant. The cases relied on, a number of which are antitrust cases, are simply cases where on the particular facts the courts held there was no genuine issue of material fact, and that consequently summary judgment was appropriate [RB, pages 12-16]. In none of those cases were the fact situations similar in any way to the *Seago Case*.

In other ways the respondents err on the law. There was no obligation upon petitioner, as respondents urge, to show "that defendants' employees and former employees had testified falsely on depositions" [RB, page 10]. Where testimony of respondents' employees is contradicted by petitioner's affidavit and documentary evidence, then the issues of credibility must be viewed in favor of petitioner, the party opposing the motion. Furthermore, as indicated by record references, petitioner has relied on many portions of depositions of respondents' employees.

Respondents also err in urging that there is any burden on petitioner to show "that the District Court's findings and conclusions were not supported by the evidence" [RB, page 11]. Here petitioner had claimed a jury trial, and District Court was not sitting as finder of fact. To show error in the courts below petitioner need only show that the evidence and the reasonable inferences from the evidence, viewed in the light most favorable to petitioner, the party opposing the motion, raised a genuine issue of material fact for trial. [See *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464; *Continental Ore Co. v. Union Carbide and Carbon Corp.*, 370 U.S. 690].

C. RESPONDENTS IGNORE THE FACTS IN THE RECORD.

Respondents purport to discuss the evidence in the record [RB, pages 17-22], but except for a few selected matters,

completely ignore practically all the facts in the record box office value of pictures in a city such as Raleigh are more accurate, because the Charlotte Area rentals fail to take into consideration the fact that some pictures have greater box office value in large towns as opposed to small ones, and vice versa [see Petition, pages 12-13]. Despite their deficiency respondents' area film rentals show petitioner's ability to produce comparable film rentals on pictures of comparable box office value by offering longer playing time and higher percentage terms.

Even these area film rentals demonstrate petitioner's 600-seat Colony to be quite comparable to the 1500-seat Ambassador on the basis of film rental per picture. On pictures $100,000 and over the Colony averaged $5,175 per picture as opposed to $5,559 at the Ambassador. On pictures between $50,000 and $99,000 the Colony averaged a film rental of $2,945 per picture, as opposed to $2,991 per picture at the Ambassador. On pictures between $25,000 and $49,000 in Charlotte Area film rental, the Colony Theatre averaged $1,640 per picture, as opposed to $1,527 at the Ambassador. On pictures under $25,000 the Colony averaged a film rental of only $363 per picture, as opposed to $723 per picture at the Ambassador. However, the average Charlotte Area film rental of the Ambassador pictures was $17,000 or almost twice as good as the Colony's $10,000 [See Defendants' Appendix, page 902a, specifically relied upon in their brief at page 18]. The average length of exhibition at Colony was longer than at the Ambassador, but many of petitioner's 153 rejected superior bids are pictures on which petitioner offered two or three times as much playing time [A, pages 77-154]. In most instances, petitioner also offered a higher percentage of film rental. It is undisputed in the record that the superior bid is determined by total film rental per picture, and not average daily film rental nor average daily gross [A, pages 171, 316, 353, 354; Pet., pages 14-15].

Nor are petitioner's superior bids based solely on a comparison of longer playing time and higher percentages "to

the complete exclusion of all other relevant factors," as respondents assert [RB, pages 18-19]. The actual performance record at the Colony Theatre on the comparatively few good pictures which it exhibited first-run demonstrates its ability to produce superior film rentals by offering longer playing time and higher percentages [See Petition, pages 14-18]. This evidence is ignored by respondents. For example, the film rental paid MGM by Colony for the exhibition of GIGI was superior to that paid by the Ambassador or by the Village Theatres on 13 pictures which were better pictures according to respondents' area film rentals [see Petition, pages 15-16]. This superior film rental on GIGI was produced by Colony by offering longer playing time and higher percentage terms [Pet., page 16], and this is exactly what the petitioner did on the 153 rejected superior bids [A, pages 77-154]. Some of these rejected superior bids have been summarized for the convenience of the Court in Appendix D to the Petition [page 71].

It should be noted that respondents have not, and cannot, deny that petitioner was generally licensed inferior first-run pictures [See Petition, pages 11-14]. This is demonstrated both by petitioner's Second Affidavit [A, pages 163-171], and respondents' area film rentals [Defendants' Appendix, page 902a]. Significantly, respondents have failed, just as did the courts below, to discuss or compare the rental terms offered on even one of petitioner's 153 claimed superior bids. Nor is respondents' assertion that the superiority of the bid is based on hindsight correct [DB, pages 18-19], since the distributor would have had the bids in front of him at the time of the award of the picture, and the superiority of Colony's terms would be just as evident then as it is today. In addition, this comparison of bids which respondents and the District Court have called "speculation" [DB, page 18] is exactly the function which the distributor admits he should perform in determining the winning bid [A, pages 302-304, 350, 353-354, 427].

Respondents' brief also ignores the evidence that 5 of the respondent-distributors failed to allow petitioner the right to bid at all during portions of the period from 1958 through 1960, and the effect of that evidence as proof of conspiracy [Pet., pages 8-9, 26]. Respondents also completely ignore, as did the opinion of the District Court, that petitioner's evidence was probative of vertical conspiracy as well as horizontal [Pet., pages 27-28].

Respondents have failed to comment on the fact that summary judgment was granted as to 4 respondent-distributors (Allied Artists, Warner, Universal and United Artists), for which obviously conclusory affidavits were filed (A 117; 132, 176; DA 64a), but for which respondents filed no rebutal tabulations such as they filed with MGM, Paramount and Fox [A, pages 568-594; see Petition, page 28]. For example, with the distributor Allied Artists, the record is undisputed that petitioner was denied competitive bidding at all during the entire period of his operation from 1953 to 1960, until the last 2 months of 1960. This was despite written requests in 1954, 1955, and 1957 [A, pages 549-553]. Certainly, in failing to find this constituted evidence of vertical conspiracy between respondent Allied Artists as a distributor and the respondent-exhibitors operating the Ambassador Theatre, which had the first choice of Allied Artists' product without any bidding, the court below was in direct conflict with the decision of the Tenth Circuit in *Paramount Film Distributing Corp. v. Village Theatre, Inc.*, 228 F. 2d 721 (10th Cir. 1955).

Based on petitioner's ratings of MGM, Paramount and Fox pictures, and the testimony of managers of Columbia, Warner and Universal, petitioner was licensed a maximum of 9 top of "A" pictures in total from those 6 distributors from 1958 to 1960 [Pet., pages 11-14]. Since 85 superior bids of petitioner were rejected during that same period [Pet., page 10], respondents' argument is indeed novel that the licensing of some top pictures to petitioner "is wholly inconsistent

with any theory of conspiracy based upon an evaluation of competing bids." The argument is unsupported by law or logic. If the figures were reversed, and petitioner had been licensed 85 top pictures, and 9 superior bids had been rejected during the same period, the argument might have a little more merit.

In discussing the evidence regarding split of product [DB, pages 19-20], respondents do not contradict the existence of the split, its *per se* illegality, or the acquiescence of the distributors [Pet., pages 31-36]. They attempt to argue that it did not affect petitioner's ability to secure pictures [DB, page 20]. However, they simply have not contradicted the evidence of the effectiveness of the split set out in the Petition [pages 22-35], demonstrating that the Ambassador and State Theatres, when petitioner's superior bids were rejected, were licensed 70% and 80%, respectively, of the pictures of the respondent-distributors upon their respective sides of the split. Nor have they rebutted the fact that the insulation of the Ambassador and State Theatres from competition from each other increased their respective bargaining positions in the split markets of each [Pet., pages 22-23].

Respondents urge that petitioner was awarded more of the Paramount and MGM pictures for which he bid, than the Ambassador [DB, page 20]. They fail to point out that of the pictures in the "A" and "B" categories of Paramount, MGM and Fox, petitioner's affidavit establishes that Colony was licensed only 10, while Ambassador was licensed a total of 42 [Pet., page 11].

(2) Respondents' Arguments Regarding Impact of Television Are Without Basis.

Respondents' arguments "as to proximate cause" that television, rather than alleged antitrust violations, was the cause of Colony's lack of success [DB, pages 20-21], are without support in the record. There is not an iota of evidence in the record tying in statistical figures with regard to television

sets in Raleigh with petitioner's Colony Theatre or any other theatre in Raleigh. Obviously, if petitioner's Colony grossed $80,271 in 1958 under "the full impact of television" (RB, page 21), the reduction to $26,493 in 1960 [A, page 71] had nothing to do with the impact of television. Of course, petitioner's ratings of box office value of pictures established that petitioner was licensed all 6 of its "A" pictures from MGM, Paramount and Fox in 1958, and none in 1959 or 1960 [A, pages 163-171, 570-576, 580-581, 585]. Furthermore, pictures such as BUCCANEER and HOUSE BOAT were exhibited in late 1958 at the Colony Theatre with excellent admission receipts, demonstrating that good do well at the Colony despite any impact from television [Pet., pages 16-17]. Nor is there any evidence in the record to suggest that television would have a greater impact on Colony than other first-run theatres.

(3) The Evidence Of Damage Was Sufficient.

Contrary to the assertions of the respondents [RB, pages 21-22], there is ample evidence in the record that petitioner "suffered damage in an ascertainable amount."

Numerous decisions have pointed out the value to a theatre of first run or other early run pictures. See, for example: *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 166-67; *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 266.

Here, petitioner has offered evidence that he was denied by conspiracy a large number of the better pictures of respondent-distributors on which he made superior bids, and was generally required to play inferior pictures. His second Affidavit rated box office values "A", "B", "C", "D", and "E" of the pictures of MGM, Paramount and Fox exhibited at Colony from 1958 through 1960, and those exhibited at the Ambassador, State and Village Theatres on which petitioner's superior bids were rejected [A, pages 575-588]. Those tables

demonstrate that the "A", "B" and "C" pictures at the Colony Theatre generally resulted in a profit after deduction of the film rental paid and a weekly overhead expense of $700 [A, page 186]. Contrariwise, those tables demonstrate that the "D" and "E" pictures at the Colony generally resulted in a loss after deduction of the film rental and overhead from the gross admission receipts [A, pages 575-588]. For example, out of 19 "D" and "E" pictures of MGM exhibited at the Colony from 1958 through 1960, 16 resulted in a loss from the exhibition. This is computed in Appendix E to the Petition. Since approximately 70% of the MGM, Paramount and Fox pictures on which petitioner's superior bids were rejected were in the "A" or "B" categories, and as a result of being denied those pictures petitioner had to license "D" and "E" pictures, damage is readily apparent.*[2] Furthermore, the record indicates that even the small proportion of good pictures licensed to Colony diminished proportionately from 1958 through 1960 [A, pages 575-576, 580-581, 585]. The impact on petitioner's admission receipts and film rental, and the resulting difference available to pay other operating expenses, is readily apparent [A, page 71]:

2*Respondents argue that petitioner could not have exhibited all the pictures he claims should have been licensed to him, because he was "licensed and exhibited Metro, Paramount and Twentieth Century Fox pictures on 894 of the 1096 days available during 1958, 1959, and 1960 (the maximum damage period — assuming damage)." (RB, page 20). Of course, this argument, even if valid, would go to the amount of damage only, and not to the fact of damage or the evidence of conspiracy. However, the argument completely neglects the fact that more than 70% of the pictures of those three distributors licensed to petitioner were "D" od "E" pictures, which no exhibitor would ever play if something better was available (Pet., pages 11-12). Almost invariably they would lose money (See Appendix D to Petition). On the other hand, of the pictures on which petitioner's superior bids were rejected more than 70% were in the "A" or "B" category (Pet., page 11). Clearly, if petitioner had been licensed these better pictures, to which his superior bids entitled him, he would not have sought to license most of the undesirable "D" and "E" pictures actually exhibited at Colony (Pet., page 11; A 187). Respondents' Charlotte area film rentals also substantiate this. Of the 72 pictures of Metro, Paramount and Fox licensed to petitioner, only 12 were in the category of $50,000 or more in area film rental, but of the 46 pictures of those distributors on which petitioner's superior bid was rejected, 39 had an area film rental over $50,000. Petitioner actually exhibited 46 of a total of 72 pictures of those distributors with an average area film rental of only $10,000 (See Defendants' Appendix, page 902a).

1958		
Gross Receipts		$80,271
Film Rental		$39,558
	Difference	$40,713
1959		
Gross Receipts		$51,719
Film Rental		$28,231
	Difference	$23,488
1960		
Gross Receipts		$26,493
Film Rental		$19,881
	Difference	$ 6,612

Again respondents ignore the record by stating "[T]here are no opinions, expert or otherwise and whether valid or worthless, as to petitioner's damage, if any, in his operation of the Colony." [DB, page 21]. In his answers to interrogatories of the respondents, petitioner estimated the gross admission receipts, film rental expenses and advertising expenses of the Colony Theatre for each of the years 1958, 1959 and 1960, if he had been allowed fair and equal access to first-run pictures of the respondent-distributors. He estimated the resulting damages as follows: 1958, $66,000; 1959, $84,500; and 1960, $98,000 [A, pages 65-73]. In view of his experience, knowledge, familiarity with the Raleigh theatres, and study of the documentary records, petitioner was clearly qualified and competent to so testify. He was never cross-examined nor his testimony impeached in any way, and respondents failed to offer testimony of any counter-expert to the contrary. See: *Twentieth Century-Fox Film Corp. v. Brookside Theatre Corp.* (8th Cir.) 194 F. 2d 846, 855-6; *Bordonaro Bros. Theatres, Inc. v. Paramount Pictures, Inc.*, (2nd Cir.) 176 F. 2d 594, 597; *Sablosky v. Paramount Film Distributing Corporation* (E.D. Pa) 134 F. Supp. 929, 936;

Sheldon v. Metro-Goldwyn Pictures Corp., 309 U.S. 390, 406-408; *Rankin Co. v. Associated Billposters* (2nd Cir.) 42 F. 2d 152.

D. REASONS FOR GRANTING THE WRIT.

It is submitted that the petition in this case demonstrated that the facts in the record in the courts below, as tested by applicable antitrust authorities amply warranted an inference of conspiracy of the respondents, and the decisions of the court below were therefore erroneous. As pointed out in the foregoing sections of this brief, the respondents' brief has not effectively challenged either the facts or the law. It is submitted that it is quite clear on the record that the courts below have seriously ignored the summary judgment procedure, and that this Court should grant certiorari in order to forbid such encroachments on the right of trial by jury.

The respondents' brief does not discuss at all the other reasons stated by the Petition why petitioner believes that it is important that this Court exercise its supervisory power. Respondents deny that a conflict exists among the circuits and with this Court [DB, page 2], but does not discuss or challenge the decisions which demonstrate that conflict [Pet., pages 23, 29-32]. Respondents' brief does not deny that competitive bidding is a modus vivendi in the motion picture industry, and that this decision, which will undoubtedly be followed by other circuits if allowed to stand, will have the automatic effect of depriving any exhibitor injured by a conspiracy relating to competitive bidding of any recourse to the courts, unless he has direct evidence of conspiracy [Pet., pages 36-40]. Nor have the respondents challenged the fact that if this decision is allowed to stand it will greatly increase the burden of this Court and of the Department of Justice in antitrust enforcement, as set out in the Petition [Pet., pages 40-42]. Respondents have not denied the importance of granting certiorari in this case, because of the prevalence of "splits of product" in the motion picture in-

dustry, and that serious need for clarification of the law relating to market division as a *per se* violation, in view of *Viking Theatre Corp. v. Paramount Film Distributing Corp.*, 320 F. 2d 285 (3rd Cir. 1963, aff'd 378 U.S. 123). The respondents have simply failed to rebut any of the reasons set forth by petitioner why it is important that this Court grant a writ of certiorari in this case.

Respectfully submitted,

MILTON BORDWIN

W. BRADLEY RYAN

Counsel for Petitioner